

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



**ORIGINAL**

**74-1037**

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**United States Court of Appeals**

For the Second Circuit.

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UNITED STATES OF AMERICA,

*Appellee,*

v.

JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA,

*Defendants-Appellants.*

On Appeal from Judgment of Conviction from the United States  
District Court for the Southern District of New York

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**Appendix**

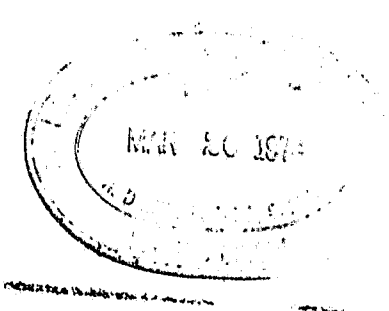
(Vol. VII - Pages 3824-3898, Sentencing Minutes  
and Exhibits)

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**BARRY IVAN SLOTNICK**  
*Attorney for Appellant, CAPRA*  
15 Park Row  
New York, N.Y. 10038  
(212) 233-5390

**GEORGE L. SANTANGELO**  
*Attorney for Defendant, GUARINO*  
253 Broadway  
New York, N.Y. 10007  
(212) 267-4488

**LAWRENCE STERN**  
*Attorney for Appellant, DELLACAVA*  
343 West 29th Street  
New York, N.Y. 10001  
(212) 947-0537



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## AFTERNOON SESSION

1:30 p.m.

MR. PEPPER: Judge Frankel, Defense Counsel, Mr. Edgehill, Ladies and Gentlemen of the jury: I also want to first thank you for your patience which you have shown during the course of this trial. This has not been a short trial. Close to 50 witnesses have taken that stand and some 200 exhibits have been identified.

In fact, summations from defense counsel alone have lasted close to six hours and, moreover, the examination of many of the witnesses at this trial was long and tedious, to say the least.

But I submit that as a result of this long examination that the government has proven its case, not on the basis of speculation, not on the basis of surmise or insinuation or what may have happened or could have happened, but on the testimony that you have heard from this witness stand and from the exhibits that were received in evidence.

Mr. Feld and I sat here fairly quietly Friday and today, at least fairly quietly for me. But I don't want you to get the impression because we didn't stand up and object that we agreed with everything that the defense counsel said during the course of their summation.



We didn't and we don't now.

But that is a courtesy which lawyers for each other at the close of the respective cases do, give each other the opportunity to speak uninterruptedly on behalf of their clients.

MR. BLACKSTONE: Objection, your Honor.

MR. SLOTNICK: That is not true.

THE COURT: All right. Lawyers do have a right to get up and object during summations. It is a right which is exercised when necessary and if it is exercised here you won't draw any inference from that.

Go ahead, Mr. Feffer.

MR. FEFFER: As I say, the fact of the matter is, there were numerous occasions when I did want to get up and say I object. That is not the way it happened. Let us take you to my side of the story.

Our procedure doesn't call --

MR. BLACKSTONE: I object to this line as being personal explanation. We of the defense counsel were bound by the rules not to give personal opinions.

THE COURT: No, it is all right. That is not what I had in mind.

Go ahead, Mr. Feffer.

MR. FEFFER: So in part that is going to be my

function right now. What I would most like to do would be to go down the road and talk to you individually because in that way I would know for certain what questions were on your minds. But, again, our procedure does not allow that and I must stand here and attempt to anticipate as best I can the questions that are on your mind.

You may recall that Mr. Feld in his opening statement urged you to concentrate on the issues in this case, specific issues in this case, and not to allow yourselves to be diverted by peripheral matters, smoke screens.

So before I go on to discuss what the evidence shows and the testimony and the exhibits that were received in evidence, let us spend just a few moments clearing away some of those clouds of dust that were thrown up for one purpose and one purpose alone, to divert your attention from the evidence in this case.

Ladies and gentlemen, there were times when I am sure that all of you thought you were sitting in a chemistry class. Thanks to Mr. Feltell, we all know about Marquis reagent tests, Mecke tests, microscopic tests, infrared tests, ultraviolet tests and so on.

Mr. Levenson had Bobby Jermain sleeping with Mrs. Ramos. Mr. Stone had John Ramos sleeping with Maxine Morris. Mr. Slotnick had Ramos describe his entire

wardrobe from 1969 through 1971. Mr. McAlevy had Joseph Conforti and his brother in a fist fight over the support of a younger brother. Mr. Levanson wanted to know whether Joseph Conforti went to church on a regular basis and how many people attended Earl Simms wedding 25 years ago.

But, ladies and gentlemen, perhaps the most prominent smoke screen was the assault you heard by defense counsel and John Ramo, Earl Simms and Joseph Conforti.

That is perhaps best demonstrated this morning by Mr. Blackstone. The first thing that Mr. Blackstone did was read to you from his cross examination of Earl Simms and he was making reference to December 8 when Earl Simms was arrested with a bag of heroin in Detroit.

He brought out the fact before you that Earl Simms did not realize that he had this half kilo of heroin in that red box and Mr. Blackstone said this, he must be a liar, he must have perjured himself because surveilling officers saw him carry a package.

Ladies and gentlemen, you ask for the transcript to be read back on this issue. There is no surveillance of Earl Simms with any package on December 8. On December 6,

yes; not on December 8.

Mr. Slotnick in his opening statement referred to Ramos as the scum of the earth, a scurvey individual, a disgusting thing, a dishonorable thing. He asked you how could a man like that look you in the face.

Well, ladies and gentlemen, from 1969 through 1971 who else was looking this disgusting, dishonorable thing in the face? Do you remember the nightclub photographs? Who was the God father of the child supposedly of this disgusting thing, this dishonorable thing?

Ladies and gentlemen, those photographs speak for themselves but one thing is very clear, John Ramos has become a disgusting, dishonorable thing since he began to cooperate with the government. Isn't that the inference, that when an individual is arrested and decides to cooperate with the government and give testimony against former colleagues who supplied him with massive quantities of heroin, isn't that when he becomes a disgusting, dishonorable thing?

Ladies and gentlemen, Conforti, Simas and Ramos were exhaustively cross examined by defense counsel. But what were these questions about?

About the facts of this case? Vary, very little.

John Ramos was on that stand for close to a week and what did defense counsel ask him? They spent hours on what agent, what police officer, what Assistant United States Attorney, saw him after November 1971, to the present.

They wanted to know whether he called or wrote his New York Attorney while he was incarcerated in Toledo, Ohio.

They wanted to know whether Emma Guarino had a school named after her family in Puerto Rico. They wanted to know whether he ever called Dellacava a moran.

They wanted to know whether he ever broke his wife's back, which we heard nothing further about. And many, many other similar questions, hour after hour.

But how many times did they put questions to Ramos on the facts of this case? Ask yourselves that question.

Mr. McAlevy tried it on one occasion and look what happened. Maybe this will give an answer. This is the question at page 792:

"Q Never once did Mr. Guarino ever hand you any heroin or cocaine, isn't that a fact?

"A Cocaine, yes."

2 Mr. McAlevy quickly changed the subject.

3 Counsel spent days in this courtroom trying to  
4 establish that Conforti, Simms and Ramos were evil men,  
5 they were narcotics dealers, that the narcotics Ramos  
6 distributed from 1952 to 1971 ended up in the children  
7 of New York City.

8 Ladies and gentlemen, counsel didn't have to spend  
9 all that time trying to persuade you of this point. They  
10 each admitted on direct examination that they dealt in  
11 narcotics. Do you really think that Guarino, Capra and  
12 Dellacava are going to sell narcotics to a law-abiding  
13 citizen?

14 Do you think that Bobby Jermain is going to  
15 form a partnership in narcotics in connection with  
16 distribution with an Eagle Scout?

17 Do you think Harris and Morris are going to  
18 buy their supply of narcotics from exemplary citizens  
19 living in New York City? Of course not.

20 Ladies and gentlemen, you are the sole judges of  
21 the credibility of Ramos, Simms and Conforti; not  
22 Mr. Slotnick, not Mr. McAlevy, not Mr. Feltell, not Mr.  
23 Levenson, not Mr. Blackstone, not Mr. Stone, not myself,  
24 not Mr. Feld or not even Judge Frankel. That is your sole  
25

responsibility. You observe each of these men on the stand and you were a few feet away from them and saw the extensive cross examination by defense counsel who are far more shrewd and clever than themselves and ask yourselves these questions:

Were they evasive? The government submits, and you may find that each of these men answered the questions put to them frankly and responsively and perhaps more important on this issue of credibility, how did these witnesses answer questions that were put to them that cast them in a bad light?

Did John Ramos deny that he kept money from narcotics transactions at his sister's house? Did he deny that he lied to his parole officer about his employment? No.

Did Joseph Conforti hide the fact that he didn't report certain income on his federal income taxes? No.

Ladies and gentlemen, as the sole judge of the credibility of these witnesses, you may ask yourselves what was the nature of their testimony. For example, did Joseph Conforti testify that he knew Guarino and Capra well? No.

2 Did he testify that he personally discussed  
3 with either of these men narcotics? No.

4 Ladies and gentlemen, if Joseph Conforti wanted  
5 to take that witness stand and invent a story, you may find  
6 that he could have done a much better job than that.

7 But more alarming, ladies and gentlemen, is a  
8 second smoke screen that was thrown up by defense counsel.  
9 There have been some rather strong insinuations that several  
10 Government witnesses lied.

11 Now, for example, that the police officers who  
12 testified that they saw Dellacava go in Jack Brown's apart-  
13 ment and come out with that toilet kit with \$11,500 in  
14 it, that this whole thing never happened. And Mr. Feltell,  
15 you will recall, asked you to base this in part on the sur-  
16 veillance officer saying that he had a black coat on and  
17 another officer saying he had a white coat on.

18 Was that their testimony, ladies and gentlemen?  
19 Let's see.

20 "Q How was Mr. Dellacava dressed?

21 "A In dark clothing, that is the outer garments  
22 were dark." That was of Cortazzo.

23 Of Millard, the other officer, the one upstairs.

24 "Q Did you see what he was wearing?

25 "A He had a long coat, knee length deep, dark



2 color. I think it was black."

3  
4 It is very strange that Mr. Slotnick, after  
5 this, stands up and tells you how decent and honorable  
6 George Eaton was. Well, George Eaton was the officer who  
7 was there on February 3rd and saw the black kit with the  
8 \$11,500 in it.

9 Ladies and gentlemen, if you believe that  
10 these surveillance officers or any other Government witness  
11 took that stand and deliberately lied to you, then you go  
12 in and you get your belongings and you come back here, and  
13 you acquit, you acquit each and every defendant, because  
14 defense counsel have resorted to the oldest trick in the  
15 world, to divert your attention from the evidence in this  
16 case.

17 Capra and Guarino and Dellacava and Jermain  
18 and Harris and Morris are on trial before you for distribut-  
19 ing large quantities of narcotics. But they want Dr. Chen  
20 to be called back so he can stand trial before you. They  
21 want the Toledo witnesses put on trial. They want the  
22 police officers and the agents and the chemists to be  
23 tried in this courtroom.

24 Let's put the entire Government on trial,  
25 ladies and gentlemen.

Well, ladies and gentlemen, the only people who

1 are on trial before you are the people that are sitting  
2 at that defense table, and nobody else, and it is their  
3 innocence or guilt that you must determine, and nobody  
4 else's.  
5

6 But perhaps the biggest smoke screen of all was  
7 Sam Sulayman.

8 Mr. Sulayman was on that stand for over a day,  
9 but what did he testify to? Did he testify that Government  
10 Exhibit 68A through L, these bags of powder, did not,  
11 did not contain cocaine or heroin, which is the only issue  
12 that is before you?

13 Did he testify to performing one single con-  
14 clusive test on any of those exhibits?

15 No, ladies and gentlemen, instead we were treated  
16 to the testimony of a disgruntled lab technician about a  
17 long-standing feud with Dr. Chen over how to run the toxic-  
18 ology lab at Toledo Medical Center.

19 He testified now to visiting Dr. Lavin's lab  
20 on three separate occasions. Do you recall that? And on  
21 those three occasions he knew before he went over there  
22 that in order to test heroin on that instrument you had  
23 to have the recorder device hooked up to it, and he  
24 testified that he asked Dr. Lavin for that recorder device.  
25 Remember that? He asked him for it.

2 And Dr. Lavin supposedly told him, it was broken.

3 Well Dr. Lavin, ladies and gentlemen, was a  
4 defense witness, and he was called back here on rebuttal,  
5 and he testified that Sam Sulayman never asked him for that  
6 recorder device and that it was never broken.

7 Ladies and gentlemen, the only question, as I  
8 have indicated, for you on these exhibits is, do they  
9 contain cocaine and heroin, and Mr. Henderson, the chemist  
10 who took the stand on Thursday afternoon, told you that  
11 he analyzed these exhibits, and that there is no question  
12 that they contain heroin and cocaine.

13 And in one sense it is very ironic because the  
14 defense sit here and tell you how John Ramos, the big  
15 drug dealer, brought a suitcase full of narcotics to Toledo,  
16 Ohio, and then they turn right around and say, well, maybe  
17 he was delivering flour to Toledo, Ohio.

18 Well, let's take a closer look at the white  
19 flour in this case, ladies and gentlemen.

20 Mr. Fuelster, the chemist -- remember way back  
21 in the beginning -- testified that this particular half  
22 kilo -- that is Government Exhibit 1C -- weighed 458 grams,  
23 and that it was 86 per cent pure.

24 Now he also testified that the average street  
25

2 dosages of heroin weighs one-tenth of a gram, and that  
3 it contains between 2 and 5 per cent heroin.

4 Well, let's use 5 per cent as a computation  
5 figure, and for anyone who wants to check, you can check.

6 This half kilo of heroin would supply 78,600  
7 street dosages of heroin.

8 Some of you may try to figure out, what 5-1/2  
9 kilos might produce.

10 Some flour, ladies and gentlemen.

11 So let's not concentrate on what isn't in the  
12 evidence. Let's take a look and examine what the evidence  
13 was in this case, what the testimony was in this case, and  
14 what the exhibits showed in this case.

15 And let's look particularly, if the Government's  
16 case rests on John Ramos alone. You have heard the word  
17 corroboration. Defense counsel say no corroboration.  
18 Let's see.

19 John Ramos was released from prison, as he  
20 testified to, in 1969, in the summer, and at that time  
21 he was introduced through a friend, Marco Delgado, to the  
22 Havermyer Social Club and at the club he met an old friend,  
23 Leo Guarino, and Guarino introduced him at that time to  
24 Stephen Dellacava or Beansy, and John Capra or Hooks.

25 That day, Guarino placed \$500 in his coat pocket

2 and told him not to do business with Marco Delgado. And  
3 the Government argues and maintains that that \$500 invest-  
4 ment earned Guarino hundreds of thousands of dollars  
5 over the next couple of years.

6 Now, Mr. Slotnick, this morning, in another  
7 attempt to assault John Ramos, said that the testimony was  
8 that Ramos didn't count the \$500 till he got home.

9 Ladies and gentlemen -- and this was supposed  
10 to indicate to you that he had to be perjuring himself,  
11 because anyone would count the money immediately after they  
12 exited the club.

13 Let's see what he really said.

14 "Q What took place at that point?

15 "A Leo put some money in my pocket.

16 "Q How much money did he place in your pocket?

17 "A Well that time I don't know. I didn't look at it.

18 "Q Did you look at it later?

19 "A Yes, I did.

20 "Q How much was there?

21 "A \$500."

22 There is no reference to an apartment or his  
23 house.

24 In any case, Ramos began going back to that  
25 same social club, the Havermeier Club in the Bronx, and the

1  
2 next time he came back, Leo sat him down and told him  
3 if he was ready to start again to commence selling nar-  
4 cotics, he could supply it for him, and he gave him the  
5 prices and he told him, he told him to go out and get your-  
6 self a good black customer like Jack Brown.

7  
8 And Jack Brown, ladies and gentlemen, we will  
9 hear about later. He was an individual who Ramos knew from  
10 prison.

11 And Ramos started going to that club several  
12 times a week, and in fact, he eventually earned the right  
13 to his own key.

14 Now of course Mr. Slotnick tells you that why  
15 would they use a lock of that sort to protect their valuable  
16 merchandise that was inside? But ladies and gentlemen,  
17 the testimony was very simple. Whenever they needed to  
18 get narcotics, Beansy left the club and went to  
19 a stash elsewhere to get the narcotics.

20 Do you really believe that these men are going  
21 to sit around with piles of narcotics in the same building  
22 with them?

23 His first partner at that time was Alex Metro,  
24 and their customers were Jimmy Rosa and Cucho, and as Ramos  
25 testified, Bobby Jermain eventually joined up with Ramos

2 in 1970.

3 Now Mr. Levenson has asked the question, why do  
4 these people want Ramos to be their partner? What did he  
5 have to offer? He had no capital.

6 Ladies and gentlemen, he had the best capital  
7 in the world, he had men who could supply him with the best  
8 heroin around for good prices, Leo Guarino and John Capra.  
9 And that is some capital.

10 The method of operation was very simple. The  
11 order was placed with Guarino and Capra, Dellacava then went  
12 out into his car, went to the stash, came back, picked up  
13 the heroin, and Jermain and Ramos would then go to the  
14 Howard Johnson's, back in 1970, and deliver quantities of  
15 narcotics to Jimmy Rosa.

16 But Guarino and Capra became very unhappy with  
17 this arrangement because Jimmy Rosa was not a good customer.  
18 He was only buying quarters and eighths and halves, and  
19 also Ramos and Jermain were exposing themselves too many  
20 times for too small purchases.

21 So the order went out, get a bigger and better  
22 customer like Jack Brown.

23 And Bobby Jermain filled the bill. George  
24 Cincey Harris, the old man, was ready, willing and able,  
25 and he knew Jermain from the past. In fact he had an out-

standing debt of \$80,000 from prior narcotics transactions. So as Ramos testified, in approximately March of 1970, March of 1970, the old man was called in, and he flew in with Stanley Marabel.

And ladies and gentlemen, if you will look at Government Exhibit 26, it is a plane ticket for two people, charge ticket, H. Marabel, George Harris, in February of 1970, February 16.

And the four of them met at Hugh Grant Circle and they rode around in the car for a while, and Jermain explained that in the future, because of Harris' debt, that all the money for narcotics would be paid up in advance up front, and Harris didn't like that very much, and he exploded, and he told Jermain, "We have made millions together," and he threatened to leave the car. But then Ramos said, "You haven't made a dime from me. And you're either going to pay up front or not at all."

And again Ramos demonstrated as to why he was a value to Bobby Jermain.

After that, Harris and his associates, Horace Stanley Marabel and Earl Simms, made numerous trips from Detroit into New York City to pick up large quantities of narcotics from Jermain and Ramos.

And you will recall that Harris was receiving



1 the highest quality of heroin, and that he showed his  
2 appreciation to Frank and Gino, as he called them, by giving  
3 each a new Cadillac.  
4

5 Mr. Mondo from Klett Cadillac took that witness  
6 stand and testified that in fact George Harris had come in  
7 during that summer and purchased not one, but two new  
8 Cadillacs with cash. He also testified that over a four-year  
9 period there were two other purchases of Cadillacs by Mr.  
10 Harris for cash.

11 That wasn't the testimony of John Ramos, ladies  
12 and gentlemen.

13 But Ramos did tell us that his car was registered  
14 to Jennie Ferrick, and Jennie Ferrick, he said, was  
15 Bobby Jermain's sister. And what does Government Exhibit  
16 67 show?

17 It shows precisely that. This is the purchase  
18 agreement with Klett Cadillac, and you may examine this  
19 in the jury room.

20 Now, Mr. Ramos also indicated that he made sev-  
21 eral telephone calls to Klett Cadillac that summer, and in  
22 fact, if you will look at Government Exhibit 134, which is  
23 the compilation of phone toll calls, and you will see here,  
24 one of the pages, call from Grace Simone, Ramos' wife, to  
25 Klett Cadillac, five telephone calls in August of 1970.

2 So ladies and gentlemen, is Ramos' testimony up  
3 to this point really totally uncorroborated?

4 But George Harris showed his appreciation for  
5 Frank and Gino in a far more significant way that summer,  
6 because he introduced them to a young mover from Detroit,  
7 Alan Morris or Worly. And you will recall that that meeting  
8 took place at Hogie's Steak House in Manhattan, and Morris  
9 agreed initially to take two kilos at a time, Guarino and  
10 Capra were a little bit suspicious about this fast-moving  
11 fellow from Detroit, and so Ramos and Jermain made their  
12 first trip to Detroit, and what they saw in Detroit they  
13 liked, and the first deal was arranged, and it went down  
14 at the gift shop, the gift shop at LaGuardia Airport. Morris  
15 and a friend came in, the friend carrying a suitcase,  
16 Jermain and Ramos went to the airport; Jermain was carrying  
17 a suitcase with two kilos of heroin; Morris and friend  
18 was carrying \$48,000. The switch took place, Ramos and  
19 Jermain go back to the house, they divide up \$8000 and  
20 take \$40,000 to the Havermyer Club to be counted and  
21 collected by Capra and Guarino.

22 Now Morris, after this initial transaction,  
23 was elated with the high quality of the heroin which  
24 he had just received, and in August of 1970 he agreed to  
25

come in and pick up two more kilos of heroin, and this particular transaction is the subject of Count 2 of the indictment.

Count 2 charges that Guarino, Capra, Dellacava, Jermain and conspirator, co-conspirator Ramos, sold two kilos of heroin to Alan Morris August of 1970.

I will come back to Count 1, the conspiracy count, later.

Let's take a closer look at Count 2. Ramos testified that in early July or August he and Jermain were asked to go out to Morris' house in Detroit.

Now on this occasion, Bobby Jermain couldn't go because- he was fixing up his house that he was building in Long Island, so Ramos went, and when he went, he was handed \$40,000 again, and he returned and he gave four thousand of it to Jermain, he kept 4000 for himself, and he gave \$40,000 to Capra and Guarino at the club.

Several days later it came time for Morris to fly into New York to pick up -- to pick up these two kilos, and you will recall that when he came in, Johnny Ramos was in the middle of preparing for the wake of his step-mother.

Jermain comes to his house and carries in a brown package in broad daylight, and Ramos, who got upset by this, went to the window with a pair of binoculars to check to see whether anyone had followed Jermain to his house.

Jermain again explained, "I can't make the delivery. I'm building a house out in Long Island. You take care of it."

Ramos agreed to do it.

And first he went to the funeral parlor that day and he carried with him in the trunk of his car, in a clothing box, the two kilos of heroin, and later on in the afternoon he had a telephone conversation with Morris; he meets Morris in the Bronx; he picks him up; Morris has some luggage, puts the luggage in his car, takes him to the airport, and he gives Morris and his wife, Maxine, back the suitcases and the clothing box with the two kilos of heroin in it.

Ladies and gentlemen, one further point on this particular count and on counts 3, 4 and 5 which we will get

to momentarily.

There is no testimony that Capra or Guarino physically touched the heroin. They didn't have to. That was Dellacava's function.

But as Judge Frankel will explain to you, one doesn't have to physically possess an object to be in possession of it under the law. If he has the power to control that object, then he, in fact, possesses it.

Now remember also that this count as well as Counts 3, 4 and 5, charge aiding and abetting, and I want you again to listen particularly close to Judge Frankel's instructions on aiding and abetting, and also to his instructions concerning the responsibility of members of a conspiracy for the acts of other members committed in furtherance of that conspiracy.

Now, Capra and Guarino at this point were very pleased. Jermain and Ramos had not one customer but two, Harris and Morris. And the money was rolling in and the future looked exceedingly bright.

So we come to November of 1970 and that is Count 3 in the indictment.

Harris and Simms made another trip to New York City to pick up another kilo of heroin.

Now, you remember that Simms testified to other

1 trips that he had made with Harris to New York City for  
2 this purpose, and you will recall the many airline  
3 tickets that were introduced to corroborate some of these.

4 For example, Simms testified to one trip with  
5 Harris where Jermain gave him two packages, and Harris --  
6 put the two packages on each shoulder, under his coat, and  
7 took them back with him to Detroit.

8 Now, let's take a closer look at Count 3 of the  
9 indictment and again, that count charges Guarino, Capra,  
10 Dellacava, Jermain and co-conspirator Ramos with  
11 distributing one kilo of heroin to George Harris.

12 And as I indicated before, it also charges each  
13 of these men with aiding and abetting the other.

14 Now, Ramos testified that he met Jermain, Harris  
15 and Simms at Tom's Villabianca Restaurant. That is in the  
16 Bronx.

17 But this time, ladies and gentlemen, they had  
18 some unexpected company, police officers, narcotics  
19 agents were there watching their every move.

20 I will come back to the surveillance momentarily.

21 Harris inside ordered up the one kilo of heroin  
22 and Ramos then left. He was wearing that evening a black  
23 cap and a black coat, and he got into his vehicle, the  
24 same Cadillac that George Harris had given him the summer  
25

2 before, and where did he go? He went right up to the  
3 Havermeier Club where he had a conversation with Stephen  
4 Dellacava.

5 And moments later he returned, he returned to  
6 Tom's Villabianca, and the three were anxiously awaiting.

t2b

2 That he stayed there for a short while and the  
3 four left Tom's Villabianca. Harris got into an automobile,  
4 a Mustang, with Jermain. Simms got into a Cadillac with  
5 Ramos, and they all went up to the Town and Country Motel  
6 up in the Bronx.

7 Inside that room, it was brought out, they were  
8 snorting cocaine but, ladies and gentlemen, when were they  
9 snorting the cocaine? After all of the transactions were  
10 made, after all the negotiations had taken place. In fact,  
11 the very last thing done that night was to snort cocaine  
12 and then what? Ramos and Jermain leave and Jermain goes  
13 to his place and Ramos goes to his place.

14 Now, defense counsel assert that you can't believe  
15 John Ramos because he was lying. There is no corroboration  
16 for his testimony. Let us go back and look at this  
17 particular transaction and see whether that is a fact.

18 Do you remember the first two witnesses who  
19 testified in this trial? Kostecke from Detroit and  
20 Johnson assigned to Singapore, both agents with  
21 the Bureau of Narcotics and Dangerous Drugs. They testified  
22 that they saw, November 5, they saw Simms and Harris get  
23 on a plane in Detroit and Detectives Nauwens and Jackson  
24 saw the same men come off that plane in New York City.

25 I believe that is Government Exhibit 39 and you



can check that and that will show you the very trip that I just referred to.

Later that day Jackson and Nauwens observed both Simms and Harris entering a Mustang driven by Jermain and Simms was carrying with him a dark attache case.

Now, where did Jackson and Nauwens see the three of them go? To Tom's Villabianca and that is exactly what Ramos said and then who showed up next in the green Eldorado? Johnny Ramos. That is what he testified to.

What about Canavan? Officer Canavan observed Ramos coming out of Tom's Villabianca, get into a green Eldorado, going up to the Havermyer Club and, in fact, he saw both Dellacava and Ramos leave that club. That is exactly what John Ramos told you.

And where did Ramos then go? He went back to Tom's Villabianca. Of course, Mr. Feltell was upset because Canavan at night in a sewer pipe didn't take out a flashbulb, put it in a camera and illuminate that entire area by taking a picture. You can probably figure out why that wasn't done.

Ramos goes back to Tom's Villabianca, goes inside, exactly what he told us and then the four of them come out, get into two motor vehicles, exactly as Ramos said.

Where did Jackson and Nauwens see these cars go?

2 To the Town and Country Motor Inn and the four of them  
3 enter. Ladies and gentlemen, isn't that precisely what  
4 Johnny Ramos testified to? Moreover, ladies and gentlemen,  
5 Exhibit 42, what is it? Town and Country Motor Lodge,  
6 11/5/70, Harris and Simms.

7 What did the agents and police officer observe the  
8 following day? Nauwens and Jackson stayed by that hotel  
9 all that night until noon the following day. At that time  
10 they observed Simms and Harris leave the Town and Country  
11 and go downtown and do some shopping. That is where the  
12 radios were purchased.

13 They then observed them going to Grand Central  
14 Terminal and from there going back up to the Bronx, to a  
15 place called Pelham Garden Motel and that evening where did  
16 they go, all under surveillance? Hugh Grant Circle in the  
17 Bronx, the same place where Simms and Harris had so many,  
18 many times in the past met Jermain and Ramos and just by  
19 coincidence who shows up? Bobby Jermain driving his  
20 Mustang.

21 They get into the car and this time they only take  
22 a very short trip from there down to 96th Street and for  
23 some strange reason Harris and Simms get out and get on a bus.  
24 They end up in Grand Central Terminal. What were they doing  
25 in that car? Earl Simms told us that. He told us that in

2 that vehicle Bobby Jermain had given them the heroin, the  
3 one kilo of heroin which they came into the city to  
4 purchase. Do you remember that attache case, the black  
5 attache case? What was in there? Again Simms told us.  
6 The money to purchase that one kilo of heroin.

7 You will recall Mr. Blackstone made a rather  
8 large production between the testimony of Simms and  
9 Canavan. You recall Simms testified to his best  
10 recollection that he had taken the radios that afternoon  
11 on the 6th and checked them into Grand Central Terminal in  
12 a locker.

13 Canavan stated that Simms still had the package  
14 with them later that evening.

15 Ladies and gentlemen, this is a bit ironic  
16 because first defense counsel suggest that the government,  
17 the agents, the police officers sat down with Simms and  
18 told him exactly what to say so that his testimony would  
19 square precisely with their testimony.

20 Now, this is no longer possible, they call  
21 Simms a liar. Ladies and gentlemen, it is entirely possible  
22 that Earl Simms may have been incorrect as to when he  
23 checked certain packages in Grand Central locker.

24 A man comes to New York City on numerous  
25 occasions, as he testified to to buy heroin, and there

2 can be very little question about that.

3 It is unlikely that any person coming to New  
4 York on those number of occasions is going to recall each  
5 and every incident that occurred.

6 Especially those events which are unimportant  
7 to him.

8 For example, I am sure each of you can recall  
9 taking a trip at some point in time but can you remember  
10 each event that occurred on that trip? Can you remember  
11 the name of each restaurant that you ate at on that trip,  
12 the name of each hotel? Of course not.

13 In any case, ladies and gentlemen, from November  
14 1970 surveillance of Ramos and Jermain and their Detroit  
15 customers is increased. Now, this morning Mr. McAlevy  
16 and Mr. Slotnick have asked why was there no surveillance  
17 of Capra and Guarino? Let us see if we can figure that  
18 out.

19 Mr. Slotnick when he had James Nauwens on the  
20 stand asked him very specifically did you have any  
21 observations of Capra from the summer of 1970 to December  
22 of 1970? That was the question he asked. No. He did not  
23 ask Nauwens, did not ask Nauwens whether he had on any  
24 other occasion since 1970 observed Capra.

25 But, ladies and gentlemen, even more compelling

2 reason, who was out on the street making deliveries?

3 Ramos, Jermain, Morris, Harris, Simms, Marabel.

4 Capra and Guarino aren't carrying bags of money  
5 and heroin in it, they don't have to. They are the men  
6 behind the scenes, the men controlling the operation.  
7 They sat in Havermeyer's Club or the golf course and that  
8 is the reason they weren't around the streets of New York  
9 meeting with Harris, Simms and Morris.

10 In December you recall Simms and Morris came in  
11 separately and came in to watch a fight at Madison Square  
12 Garden and what did Simms tell us on that occasion? He  
13 said he stayed at the Commodore Hotel. What does 43 show,  
14 ladies and gentlemen? Earl Simms, Commodore Hotel for  
15 that evening. No corroboration, ladies and gentlemen?

2/ 16 Again, Detectives Nauwens and Jackson were on hand  
17 and they observed all these people going to Madison Square  
18 Garden. The fight picture, Simms, Morris, Jermain, Ramos,  
19 doing exactly and precisely what Ramos and Simms said they  
20 did.

21 Again, Jackson and Nauwens are on hand to see  
22 what is happening after that fight. What took place after  
23 the fight? Well, you recall that Jermain and Simms went  
24 over to the side somewhere and had a conversation. Jackson  
25 and Nauwens saw this conversation, ladies and gentlemen,

and it is entirely possible that at 12 o'clock at night, outside of Madison Square Garden, these men were discussing Bobby Jermain's landscaping or Simms was ordering up some fish at the Allerton Fish Market and maybe, just possibly Jermain wanted to buy a car from Earl Simms.

But you may also find, as Simms testified, that in that conversation he ordered up a half kilo of heroin and in fact, ladies and gentlemen, Ramos testified that after the Garden flight they went to Diane's Bar, saw Capra, Guarino and Dellacava, and they ordered up a half kilo, this half kilo. Does this half kilo, ladies and gentlemen, look like a radio?

Following Simms arrest in December, Jermain and Ramos become much more cautious. In fact, they only see their customers in cities other than in New York. So in February of 1971, Ramos testified that he and Jermain went to Florida. Sure enough, what does Government Exhibit 39 reflect? Two tickets, Ramos and Jermain to Florida.

Ramos further testified that when they arrived in Florida Alan Morris picked them up at the airport and he was driving a Cadillac with Michigan plates.

Sure enough, do you remember the two agents from Florida, Harper and Campbell? They said Morris picked up

1 Jermain and Ramos at the hotel, driving a Cadillac with  
2 Michigan plates.

3  
4 Ramos then testified that Morris drove them where?  
5 To the Sheridan Beach Motel where they registered under the  
6 name Peter Martalerro for Ramos and Mr. Frank for Jermain  
7 and what do Exhibits 76 and 77 show? Peter Martalerro and  
8 Frank, Sheridan Beach Motel. No corroboration, ladies  
9 and gentlemen?

10 What took place then in Florida? Ramos testified  
11 that on that trip Morris put in his first 10-kilo order for  
12 narcotics and you recall that Morris wanted three of the  
13 10 kilos on consignment, that he would receive three and  
14 pay later and the rest he would pay for in advance.

15 So they decided to set up another meeting place.  
16 They got the Sheridan booklet from the room and decided  
17 that Cleveland, Ohio, would be a mutually convenient  
18 place to meet in March for the payment on this shipment.

19 Ramos and Jermain returned to New York City after  
20 this trip to Florida and go to the Havermyer Club and  
21 tell Capra and Guarino we got a big one, 10-kilo shipment  
22 but Morris wants three kilos up front. What did Capra say?  
23 No money, no heroin.

24 So the deal had to go out for six kilos of heroin  
25 and cocaine. The cocaine was out of the question, it wasn't

2 profitable enough. So in March, 1971, Ramos and Jermann  
3 go back to Cleveland and they pick up close to \$150,000 in  
4 cash.

5 Now, this is a time period when Ramos' phone is  
6 being tapped and Mr. Slotnick wanted to know why his  
7 client was not overheard speaking on this telephone.  
8 What did Ramos tell us? Ramos told us that he had to change  
9 the telephone number on that phone because he knew at that  
10 time that his phone was tapped.

11 Second, where was Ramos during most of the time  
12 that his phone was tapped? He was in Florida in February  
13 of 1971 and Cleveland. When they returned to the city with  
14 \$145 or \$150,000, they go to the Martell which is here  
15 in Manhattan. Who did they meet? John Ramos meets Capra  
16 and Guarino and here, ladies and gentlemen, Ramos is  
17 informed there is going to be a change, a change because  
18 of security reasons.

19 That the method of delivery is going to be  
20 changed, a courier is going to take a suitcase with six  
21 kilos in it, fly to Detroit and then is going to leave the  
22 suitcase in a baggage claim area and mail the baggage claim  
23 information to Morris in Detroit.

24 Next question, who was going to take the suitcase  
25 to Detroit? You will recall the first name that came up



was that of Nicky Cucciniello and it was rejected. Why was it rejected? Because someone said that Nicky Cucciniello works for Herbert Sperling. Do you remember what Herbert Sperling testified to?

He said that he used to reach Nicky Cucciniello at a phone listed in his book to Beans, 722-9595, Diane's Bar. So Cucciniello is out of the question.

But a man named Patrick Vecchio was ready, willing and able to go.

In fact, a week or so later Ramos testified that he met Vecchio at the Blue Lounge in the Bronx and Vecchio told him the deal went down and Ramos told him the next time a shipment is made we are probably going to use you.

During the course of that summer Morris placed his order for the next shipment. The shipment that made its way to Toledo, Ohio. Again, he wanted 9 kilos of heroin and one kilo of cocaine. Again, Capra said nothing doing on consignment. All the money up front. We will give him six kilos of heroin and this time we will give him the cocaine.

These two transactions are the subject of counts 4 and 5 of the indictment, that is the heroin and cocaine found in the Toledo terminal.

Now, arrangements were then made for Morris to come in and to deliver the money, to deliver the money for that shipment and you recall the man named Rocco Sassone made two brief trips to Detroit, was called in by Ramos and drove to the airport and they picked up Willie Middlebrook and Alan Morris and where did they go? To the Lincoln Square Motor Inn in New York City where Ramos picked up a suitcase with \$145,000 in it and Ramos testified that he made a phone call from that room to Capra.

Government Exhibit 44, Mr. A. Morris and J. Middlebrook, Lincoln Motor Inn, charged, long-distance telephone call, 28 cents.

Ladies and gentlemen, when you make a telephone call to someone in Westchester County from a phone in New York, does that call appear on the bill of the person that you call, if you don't call collect? Of course not. It is right here.

Again, what was the method of operation going to be? The same as before. It worked perfectly before, Pat Vocchio did a great job, a suitcase would go out, it would be left in the baggage room area and a receipt, a claim check mailed to Morris, but Morris said it is going to Willie Middlebrook this time and the reason was that he was arrested with Ramos and Jermain in May of 1971.

3/ He felt he was hot. So this time it was going to go to Willie Middlebrook, his partner.

What did he do? He wrote down on a piece of paper the address for Middlebrook in Detroit, Michigan. The following day, Capra was supposedly at home and Ramos went to his house but when he got there, he missed him. The maid told him that he was at the Lake Isle Country Club and Ramos testified, "I caught Johnny before he teed off on the first hole."

Then what happened? They go to a parking lot and a suitcase with the \$145,000 in it is turned over to Capra who placed it in the trunk of his car.

So the money is in and the arrangements for the shipment still had to be made.

There was only one problem, ladies and gentlemen. Pat Vecchio, as testified to by Ramos and Detective George Eaton, Mr. Slotnick's decent honest cop, testified that Vecchio was arrested in October of 1971 and was in jail so he couldn't make the trip.

They had to find a new courier to do the dirty work and a meeting was held in Diane's Bar and Dellacava says "I know a guy who needs the money."

And Leo Guarino says "Make sure it is not a moron." Do you remember that, "Make sure it is not a moron."

Dellacava said "Don't worry about a thing, I got it all under control, just leave it to me."

Ramos gives him the slip with Willie Middlebrook's address. At this point Ramos testified that Hooks, Capra asked Dellacava to bring over a piece of paper so he could calculate the balance that was still owed by Morris.

You have heard quite a bit about Government Exhibit 21 and the writing on that. We will get back to that momentarily because in the first Sunday in October, Dellacava and Ramos go to the train station and they learn from the information booth that there are no trains going to Detroit, Michigan from New York.

Now, Mr. Feltell said if there were no trains going to Michigan from New York, why didn't the government come in here and prove this to you through documents of some type. Well, ladies and gentlemen, the defendants have the power of subpoena as well and they have put on witnesses in this case and do you think for one moment if there were trains going to Detroit in October of 1971 they wouldn't have paraded a witness to the stand and proved that?

Anyway, as we all know, in October 20, 1971 a suitcase containing five and a half kilos of heroin and one kilo of cocaine was delivered to the railroad terminal

in Toledo.

Contrary to what Mr. Feltbell suggested, Ramos testified that he learned about this about a week or so after the first Sunday in October.

October 31 who shows up in the Detroit Railroad Station? Morris, Mospaden and Middlebrook.

You will recall, ladies and gentlemen, that when Joe Morrin took that stand and identified Morris, this time there was no newspaper in front of Mr. Morris and Mr. Morris had the address in Cleveland in his pocket, in an envelope and this is Government Exhibit 21. Of course, it is conceivable as Mr. Stone argued that Alan Morris in Detroit, Michigan was merely at the local railroad station by coincidence having a cup of coffee and you may find that.

Do you remember the slip of paper that Capra wrote on, this paper here? Now, Mr. Slotnick has suggested that police officers, chemists, everyone in this world were responsible for taking a half kilo out of that suitcase because six kilos were supposed to go and five and a half ended up there. Do you remember that?

Well, ladies and gentlemen, let us do simple mathematics. On the top of this figure you see 28. 28 is the price that is being charged by Ramos and Jermain,

2 \$28,000 per kilo to the customer, Alan Morris. And you  
3 multiply it by six, which is down here, 28 times six and  
4 you get \$168,000.

5 Then 15 for the cocaine, \$15,000, what they  
6 charged Morris for the kilo of cocaine and the cost to  
7 them, ladies and gentlemen is 12. But you multiply it,  
8 you add 15 to 168 and you get \$183,000.

9 But how much money did Morris pay. He only  
10 paid \$145,000 leaving a difference of \$38,000 still owed.

11 Of course, ladies and gentlemen, Mr. Slotnick  
12 has urged that Mr. Ramos is lying and that Mr. Capra did  
13 not write the figures that were contained on that exhibit.

14 Well, let's take a closer look at this exhibit  
15 again. What did the handwriting expert testify to? He  
16 said that he received handwriting samples of John Capra  
17 and that he took this side of Government Exhibit 21 and  
18 compared them with the handwriting samples that were given  
19 to him and what did he say about this exhibit? He said  
20 that there was insufficient writing, as it only contains  
21 DEB and BAL, and not making a determination as to whom may  
22 have written this particular document.

23 Now, let us go one step further. Mr. Slotnick  
24 told you to refer to Government Exhibit 135. Do you  
25 remember these? These are the sign-in sheets with John

2 Capra's handwriting and numbers all over them.

3 Ladies and gentlemen, if there is one  
4 exhibit the government requests you to ask for in that  
5 jury room, it is 135. On this exhibit you will see that  
6 the number 3 in 73 is written in excess of 80 times and  
7 you compare the three on that exhibit with the three in  
8 38 on this particular note. And you look at the "a" in the  
9 word Bal and the "e" in the word Capra and you tell me,  
10 you tell the government who wrote that note.

11 All right, ladies and gentlemen, let us consider  
12 now the \$64,000 question. Who brought that suitcase to  
13 Toledo, Ohio? Who delivered that suitcase to the terminal  
14 on October 20, 1971?

15 The defendants have charged that three people  
16 took that stand and positively identified John Ramos as  
17 the individual who appeared with that suitcase on October  
18 20, 1971.

19 Now, let us review briefly the testimony  
20 of Milt Julert, Charlie Sibold and Ruthella Radebush on  
21 that identification.

22 These people are obviously all well-meaning  
23 people but let us see if just perhaps they could have made  
24 an error. Let us start again with the face of this note.

25 What does it say? "Go to Penn RR Toledo, Ohio,

checkroom open in daytime only."

That is the back of the note that the government alleges was written by Capra.

Is there any doubt, ladies and gentlemen, that this side of the note had to be written by the person who delivered that suitcase in Toledo? Only the person who placed the bag in the room in Toledo and knew the hours that that room was open could write this note. So there is no question about that.

But more importantly, what did Mr. Campbell, the postal inspector in Toledo, Ohio, tell us? He told us that the envelope that this note was contained in was sent from Toledo, Ohio on October 20.

There is no question about that, the person who wrote this note, this side of the note, placed it in this envelope and mailed it to Willie Middlebrook.

The only unfortunate part is Ramos testified that Middlebrook and Morris weren't home when this envelope was sent. Where were they? They had for some reason checked into the Sheridan Hotel in Detroit, and you recall the names they used, Alan Schwartz and the Reverend William Middlebrook, Government Exhibit 47.

So by the time that Middlebrook received that



letter, after he talked to Ramos, it was too late because the Police Department had intervened and they were ready for someone to come pick up that suitcase. Very simple. If Ramos delivered that suitcase he obviously wrote the note and the envelope and there is no question about that.

Mr. Caputo testified that he took the handwriting samples Mr. Ramos supplied him and compared it against this note and what did he come up with? He said that John Ramos could not have and did not write "Go to Penn RR Toledo, Ohio, checkroom open in daytime only."

What else did he do? He checked the handwriting of Joseph Messina who was not here today, like Jack Brown, and Caruso who are not here today. He took the handwriting of Messina and compared it with the same portion of this note and what does he say? He said that Joseph Messina wrote that note.

Of course this is true also with 21B. Mr. Willie Middlebrook and the address on the envelope.

Now, let us look at very, very important testimony about this guy Joseph Messina, because you recall that when the man who delivered this suitcase in October of 1971, that he went to the ticket window and had a conversation with Mr. Sibold and what did he tell Charlie Sibold?

He said to him that he had an uncle who was sick in New York City and that he had to get a flight back to see him because he passed away.

Do you remember what happened when Sibold asked him his name? What name did he give? When he was asked what his name was he gave the name Messina. Messina? Answer Messina.

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Ladies and gentlemen, not Peter Martalerco, the name used so often by John Ramos -- Joseph Messina. And ladies and gentlemen, just by coincidence, what does Government Exhibit 46 reflect? Airline ticket. October 20, 1971. J. Messina. Toledo, Ohio, New York City.

On top of this, let's look at the following: John Ramos testified that in 1969 he resumed dealing in narcotics, and he placed one restriction on it, one restriction. He said that he had four prior narcotics convictions, and this time he was going to make certain that he wasn't caught with the goods, and in fact, the testimony of Sims and Ramos throughout shows that the guy who delivered the stuff or the goods was Bobby Jermain, except on that one occasion in August of 1970, when Jermain was working on his house.

More important, what happened on May 4, 1971, just five months earlier in Cleveland, Ohio? Ramos, with Jermain, and Morris, and his wife, Maxine, were placed under arrest, and you recall that Ramos was in jail for five days. Remember that? And what happened when he got out? He went home, and Capra and Guarino couldn't understand how the parole office failed to catch this arrest, because if they caught this arrest he would have gone back to jail for four

and a half years, but they missed it. So he decides, at their urging to lay low for the summer, and he takes his family and he goes to Monroe, New York.

Now, ladies and gentlemen, does it make any sense whatsoever that immediately after that summer, in October of 1971, that John Ramos, having come so close to going back to jail for four and a half years, would suddenly turn around and carry a suitcase with narcotics in it on a train to Toledo, Ohio? Does it make any sense that John Ramos, an experienced narcotics violator, would walk into Mr. Julert, raise his voice at him, and thereby cast suspicion on that very suitcase, an experienced narcotics dealer?

It is kind of hard to imagine John Ramos raising his voice at all. Does it make any sense that John Ramos, this experienced narcotics violator, would go to Charlie Sibold at the ticket office, and tell him his home city? I am going back to New York City?

No, ladies and gentlemen, this sounds more like the work of some inexperienced, frightened courier that was found by Stephen Dellacava to do the work, and you will recall that Leo Guarino told Dellacava, don't pick a moron. Well, Dellacava, ladies and gentlemen, loused up.

2 Use your common sense when you go into that  
3 jury room. Don't abandon the way you look at things in life.  
4 Don't abandon your judgment or your common sense.

5 And with all this in mind let's take a closer  
6 look at the testimony of Mr. Julert, Mr. Sibold and Miss  
7 Raudebush, on top of everything we have discussed.

8 First, it is important to remember that each  
9 of these witnesses only saw the man in question for a very  
10 few moments on that day, October 20, 1971.

11 Now Mr. Slotnick, of course, tells you that  
12 Miss Raudebush saw this man for quite some time on that day,  
13 face to face.

14 Well, you may find, ladies and gentlemen, that  
15 when a woman drives a taxicab, that she hardly has an  
16 opportunity to be driving face to face with her passenger.

17 Secondly, Julert and Sibold next said, or testi-  
18 fied, excuse me, that the next time that they saw this  
19 man, the man that they saw so briefly in October of 1971,  
20 was close to a year later at a trial.

21 Miss Raudebush said she saw some pictures in  
22 November, and she said on the stand that the pictures of  
23 the people in the photographs did not look similar to each  
24 other. That was her testimony.

25 And ladies and gentlemen, I am sure that you will

1 all recall that when this woman, who was so positive  
2 of her identification, was shown a picture of John Ramos,  
3 sitting in a night club, with his face full flush to the  
4 camera, full flush to the camera, that she could not pick  
5 him out.  
6

7 Third, Mr. Julart and Mr. Sibold each were sure  
8 of one thing, that the man's hair was different, that the  
9 man's hair was different. John Ramos' hair was somewhat  
10 different than the man they had picked out.

11 And you heard testimony about the hair being  
12 brushed back.

13 Take a look at Government Exhibit 15, and see  
14 whether John Ramos' hair is brushed back.

15 As opposed to Government Exhibit 12 where his  
16 hair is more down over the front of his face.

17 They recall the hair back, and they recall  
18 that he parted his hair on the right side of his head.

19 Now, Mr. Ramos was here on the stand for close  
20 to a week, and of course, the Government submits that you  
21 may find on which side he parted his hair, but in addition,  
22 in addition, James Nauwens, when he was recalled to testify,  
23 stated that on November 20, -- excuse me, November 10, 1971,  
24 when he placed Ramos under arrest, that his hair was  
25 parted on the left side of his head.

Now ladies and gentlemen, the defense talks about reasonable doubt.

Do you recall the testimony of Jerry Lino, the police officer who took some photographs on 54th and Seventh Avenue, and these photographs were passed to you? These were exhibits 122 through 126.

Remember these photographs? Well, you can look at each of these photographs, and he testified that he took a picture of JohnCapra, and these photographs speak for themselves, and you can determine whether JohnCapra is on these photographs.

But what happened when he came in to this courtroom? He came in to this courtroom a year later, an experienced police officer, and what happened? He made a very simple mistake. One year later he makes a very simple mistake. He picks out Bobby Jermain.

And you may ask yourselves whether there are similar characteristics between the face of Jermain and Capra.

Ladies and gentlemen, the point is simple. When it comes to the eye witness identification of anybody after a year, after a year, people sometimes make mistakes.

And that is precisely what the Government says happened in this case.

1  
2  
3 But ladies and gentlemen, the most important  
4 and compelling reason why the Government submits that  
5 John Ramos did not take that suitcase to Ohio is this:  
6 Defense counsel have been saying repeatedly that he would  
7 like to help the Government. Is that correct? He would  
8 say anything to help the Government.

9  
10 No question about that. Ramos was convicted in  
11 Toledo, Ohio, of what? Two separate offenses, conspiring  
12 to distribute narcotics -- he took that stand and he said,  
13 "I was guilty of that. I conspired with other people to  
14 sell narcotics."

15  
16 He said, "I was not guilty of bringing that suit-  
17 case there."

18  
19 Now as a result of his cooperation, what was he  
20 promised? He was promised that his sentence would be  
21 reduced to time served or two years, whether he took that  
22 suitcase to Toledo, Ohio, or not. That was his promise, un-  
23 conditional.

24  
25 Now, ladies and gentlemen, John Ramos is the man  
that would say anything to help the Government, anything.  
He would take the stand and lie through his teeth to help  
the Government.

If that is the case, ask yourselves this one  
question. Why didn't John Ramos take that stand and



1 say, "I delivered the suitcase to Toledo, Ohio, on October  
2 20."

3 Woulda't that have been simpler? His testimony  
4 would have then been squarely in line with Julert, Sibold  
5 and Raudabush.  
6

7 No problems.

8 Did he do that? Is that what he said? Here  
9 is a man who has admitted selling narcotics from 1952,  
10 to deliveries weekly, and one delivery he denies making.  
11

12 Why, ladies and gentlemen, when this man  
13 could have helped the Government by taking that stand and  
14 saying, "I delivered that suitcase," did he refuse to do  
15 so?

16 And that is the question that I want each of  
17 you to ask when you are considering about the truthfulness  
18 of this witness.

19 Now, Ramos and Morris, following their arrests  
20 in Toledo, Ohio, dropped completely out of the picture.  
21 And Count 1 charges, as Mr. Feld told you in the opening,  
22 a conspiracy that began in July of 1969 and terminated at  
23 the end or the beginning, excuse me, around March 1973,  
24 April 1973.  
25

Now contrary to what Mr. Stone or what Mr.

Blackstone have told you, a person doesn't have to be a member of a conspiracy for its entire duration.

MR. BLACKSTONE: I object. I didn't say any such thing.

THE COURT: Well, the jury will recall, and in any event, the main thing is the evidence. Go on.

MR. PEPPER: Listen carefully to Judge Frankel's instructions in this regard, because you will find that some members, such as Ramos and Morris, joined the conspiracy early, and they withdrew, and other members, such as Conforti didn't join until the very end, in March of 1973.

But ladies and gentlemen, the Government submits and you may find that they were all members of this conspiracy, and in fact, that a person may be a member of a conspiracy for as short a time as one day and still be a member of that conspiracy.

In this case, the Government alleges that Capra and Guarino were the directors and managers of that conspiracy, and that they were members from the beginning, and to the very end, and that others joined up along the way, and some left, and at the end we find other people joining up, when they are arrested in April of 1973.

Now, Ramos' arrest in 1971 did not stop Capra and Guarino. On December 9, you will recall that George Eaton, a New York City police officer, commenced electronic surveillance or wiretap at Diane's Bar, and now we no longer hear from Ramos and Simms. Now we hear from Capra, Guarino and Dellacava themselves, all engaged in conversations related to narcotics.

Now let's take a look at several of these conversations which defense counsel argue are innocent on their face.

But before we do that, Mr. Slotnick this morning said that in one of these conversations Capra refers to, "Hello FBI." Well, ladies and gentlemen, you take the transcripts that were received in evidence in this case and you examine them and you see whether John Capra ever said, "Hello FBI."

On January 10th, 1972, Jack Brown called Stephen Dellacava. Now, you will recall that in 1960 Guarino told Ramos to get a big mover just like Jack Brown, and these conversations help explain why he made that statement.

In this conversation, Brown suggests that he and Dellacava get together for a game of chess, and Dellacava then asks if he should bring the big fellow, and Brown

replies, "Yeah, bring a hogey sandwich."

On Tuesday, February 2nd, at 9:05 P.M., Brown calls Dellacava again, and again Brown suggests that he and Dellacava get together, the following evening, for a friendly game of chess, and Brown this time asks Dellacava to bring a little friend as opposed to a big fellow, and that Dellacava will provide the hors d'oeuvres and other things.

Well, Detective Eaton was obviously curious about the chess interests of Brown and Dellacava, and he decided to place Dellacava under surveillance the following evening.

But before his surveillance commenced, another call came in to Diane's Bar, this time by Leo Guarino, and Guarino asked Dellacava if he has seen our friend, Jack, and Dellacava relates that he is having problems, because he doesn't have his telephone number at this other place where he is at, and Guarino, you will recall, after some fumbling around, comes up with a telephone number.

And then what happens? Dellacava calls up that telephone number and speaks to Mrs. Brown, and Mrs. Brown says, he is already at the place.

And Dellacava knows and acknowledges that he knows where Brown is.

2 And finally, Dellacava calls back Guarino,  
3 and Guarino tells him, "I will be dining at the Rainbow  
4 Grill. I will meet you at 10:30, Fifth Avenue, by the  
5 status."

6 And what happens? Dellacava is followed first  
7 to New Jersey, where he manages to lose surveillance. He  
8 then comes back directly to Jack Brown's house, and you will  
9 recall that Detective Millard was positioned in the  
10 hallway, in the stairwell, observing what took place. And  
11 I am sure you will recall Mr. Feitell's endless questions  
12 about how many peepholes that Millard made in the cardboard  
13 to see what was happening in that hallway.

14 Dellacava arrived, he entered the apartment,  
15 and he remained approximately five minutes.

16 Certainly, ladies and gentlemen, one of the  
17 fastest chess games on record.

18 And when he exited, when he left that apartment,  
19 what was he carrying? He was carrying a black toilet kit.  
20 And where did he go? He met Leo Guarino.

21 And they were both arrested.

22 And in the trunk of the car where the black kit  
23 had been placed was found the same black kit with \$11,500  
24 in cash.  
25

MR. FEITELL: Objection and move that be stricken.

There is no such testimony in the record.

THE COURT: It is argument, Mr. Feitell. Objection overruled.

MR. PEPPER: Now, Mr. Feitell, and other defense lawyers have said, well, this didn't happen, why didn't the Government call other officers who were present. Well, ladies and gentlemen, as Judge Frankel will tell you, they have the power of subpoena too, and if they were convinced that they could call other people to show that this toilet kit didn't exist, you can be well assured that they would have taken that course of action.

And next you will recall a series of conversations between Dellacava and a man named Vito Green, in which they are always concerned about the health of the other person, two conversations, ladies and gentlemen, two conversations take place within an hour on December 11th.

Let's look at these two conversations. The first one, December 11, at 7:16 P.M. "Dellacava: Hello.

"Green: How are you feeling?

"Dellacava: Not so good, Pal.

"Green: Well, not so good. Well, well, I think we gotta wait til Monday. All right. All right, my buddy, all right. I'm sorry I can't help you. Well,

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2 what are you going to do? Well, what's there, is there, 3879  
3 right? All right. Okay, Bud."

4 An hour later, 8:20 P.M.

5 Dellacava talking to the same person.

6 "Dellacava: Hello.

7 "Green: How you feel?

8 "Dellacava: uh, uh, sick, sick, sick, really."

9 "Green: Me and you both.

10 "Dellacava: My God. All right, try and keep in  
11 touch with me, hugh, Pal?

12 "Green: 'Bye.

13 "Dellacava: Okay."

14 Finally, on January 7, ladies and gentlemen,  
15 Beansy andVino have fully recovered. They are both feeling  
16 fine. Vino tells Dellacava that "It grewed."

17 Ladies and gentlemen, have you ever heard in  
18 your lives two adults talking in that manner? Does it sound  
19 like they are trying to cover up a shylocking operation,  
20 a gambling operation?

21 Ladies and gentlemen, the Government submits  
22 that you may find that when they are sick, narcotics are  
23 unavailable. And when they feel fine, the white powder  
24 flors, it grows, and they arrange to meet each other, and  
25 they do so.

Next we have a series of conversations between Dellacava and Capra, and in these conversations Capra is persistently calling Diana's Bar to inquire of Dellacava if he has seen a certain individual.

On January 14th, at 6:48 P.M., Capra calls to find out if Beansy has an appointment with the right guy, the guy you supposed to see.

January 18 at 6:12 P.M., Capra calls Diana's, and they discuss meeting to split up the money.

Capra inquires whether Beansy has heard from "that other guy."

For some peculiar reason, ladies and gentlemen, no one, no one or no place in these conversations have names. Does a shylock go to all that trouble to disguise his conversations?

Let's stop a moment. There has been a lot of testimony about Capra being a big shylock, loaning money to everybody.

The big coincidence is that he loans money to people who are narcotics dealers, Sperling, Ramos, ladies and gentlemen, where does Capra receive all the money that he loans out at 2 per cent a week?

Where does that money come from?

On January 20, 1972, Capra calls Dellacava again



at Diane's Bar, and again Capra is still inquiring about  
the same guy. He wants to know, has Beansy heard anything?

Again Beansy tells him, no, not yet.

On January 21, Capra calls again, and asks what  
happened?

Dellacava answers "Not much. He'll be in either  
today or tomorrow night for sure. What am I going to say  
to you? The other guy's coming tonight, so I'll have to  
wait for him.

"Capra: You spoke to this guy?

"Dellacava: Yeah, I spoke to him, hollered at  
him. Says he's got it. He's just waiting on something.  
I don't know."

January 27, Dellacava explains again to Capra  
that this guy hasn't come through.

"Yeah, (this is Dellacava), I called him this  
morning, and he explained something to me, you know, he,  
according to him, uh, I've got to give you an explanation,  
I, I yelled at him and told him what the story was, after  
all, we were behind.

"Capra: Yeah.

"Dellacava: These people don't want to know  
nothing. They, they want a job. They don't want to know

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nothing. So he says All right, look, Steve, I'll call you <sup>3882</sup>  
tonight late, if not tomorrow. I'll be in definitely,  
he says, don't worry about it, everything is intact, if  
that's what you are worried about.

"I says, that isn't the point, we're getting,  
we're being pressed, you know, what you are saying, I am  
saying it to him, you know.

"Capra: Right.

"Dellacava: I said these people are on our  
backs. After all it ain't a dime. A car costs a lot of  
money, you know."

Is that shylocking conversation?

Are people on their backs?

Ladies and gentlemen, we have heard a lot of  
evidence in this case about cars, about Parkchester  
Lincoln-Mercury and about Klett Cadillac. But we have heard  
nothing that Capra and Dellacava were competing with these  
two places in the sale of cars.

The Government submits, and you may find  
that when Dellacava says it ain't a dime, a car costs a lot  
of money, that he is referring to the fact that they are  
dealing with a large amount, a large quantity of narcotics  
as opposed to a dime, a small quantity.

2 And finally we have a series of conversations  
3 where everyone is vitally concerned about their Christmas  
4 present.

5 On December 21 Brown tells Dellacava that his  
6 cousin is sick. Everyone seems to get sick.

7 Dellacava says he will drop by Thursday to bring  
8 up a present.

9 And what happens on Thursday? Dellacava calls  
10 Capra and says the following: "Do I have to bring anybody  
11 anything? You know, like a present for them people?"

12 Capra replies: "Yeah," and he acknowledges that  
13 Beansy can pick up there.

14 Well, you recall that following this conversa-  
15 tion Dellacava was followed up to a social club in the  
16 Bronx, and that he was seen removing from a trunk, the  
17 trunk of a Lincoln, with New Jersey plates, a package, and  
18 that same car was seen by Nauwens with John Capra driving it  
19 at a later time.

20 Dellacava is then followed from that location  
21 to the area of 79th Street in Manhattan, on the West Side.  
22 And you will recall that at that time surveillance is  
23 lost.

24 Later they learned that they lost surveillance  
25 in the area of Jack Brown's apartment.

Christmas passes, ladies and gentlemen.  
December 25 comes and goes, but that couldn't stop these people from worrying about their presents.

On December 29, three telephone calls. Brown calls to Dellacava to tell him "Tell everybody I like my gifts."

Next telephone call, later that night, Capra tells Dellacava, and they engaged in the following conversation -- I will read a portion of it.

"Who do you think it is," says Capra.

"Dellacava: It's my best buddy.

"Capra: Did you go see, what's his name, our friend?

"Dellacava: Yeah, yesterday.

"Capra: He didn't have no Christmas present?

"Dellacava: No.

"Capra: Didn't you say he had a present for us? Didn't you tell me that?

"Dellacava: I said that to you?

"Capra: Yeah."

(Inaudible).

Well, Dellacava is going to make darn certain that when Capra wants that Christmas present he is going to get it and who does he call? He calls Jack Brown at

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10:30 that night. Remember that Brown and Dellacava had<sup>3885</sup>  
already discussed earlier Christmas presents. But Capra  
wants to know where that present is and Dellacava persists.

Dellacava, the last conversation: "Remember  
you told me one time that you might give them fellows a  
Christmas present, you know, give them fellows a Christmas  
present?"

"Brown: Yeah, yeah.

"Dellacava: Can you help them?"

"Brown: Uh, do you want it tonight?"

"Dellacava: If you can."

Have you ever heard so much concern among adults  
about Christmas presents four days after the holiday?

Dellacava has certainly earned the right to be-  
come Santa Claus the way he keeps up on this.

Ladies and gentlemen, you may find that after  
that conversation, that Jack Brown raced down to Macy's  
at 10:30 at night, and got a Christmas present for Capra.  
But you may also find that Brown's present was still another  
bundle of money for a narcotics transaction.

And finally, ladies and gentlemen, we come to  
Herbert Sperling, the man who testified that he was a  
bookmaker and totally uninvolved in narcotics, the man who

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was convicted of narcotic violations in 1960 and in 1973,  
sitting in this very courtroom, the man who testified that  
he was deathly afraid, deathly afraid of Joseph Conforti,  
the man who was found in 1968 with a pistol, in 1971 with  
a pistol, and later with two loaded pistols, a pick handle  
and a hatchet in his car, the man who had Leo Guarino as  
his best man at his wedding and Capra as a close friend,  
the man who testified that these two close personal friends,  
his best friends, used to borrow money, and he used to charge  
them 2 per cent, his best friends; the man who said he didn't  
know Beansy, but who had in his telephone address book,  
"Beans, 722-9595."

And finally the man who had John Ramos' home  
telephone number in the same address book.

And do you suppose, ladies and gentlemen, that  
he used to call John Ramos to collect bets?

Now, Mr. Slotnick said something very interesting in summation. He said that Sperling testified that he never knew Capra.

MR. SLOTNICK: Your Honor, that is not correct.

THE COURT: Pardon?

MR. SLOTNICK: That is totally incorrect.

THE COURT: I don't know whether he said that or not. Mr. Slotnick said he did not say it. I think you ought to accept that, and we will proceed.

MR. PEPPER: I will accept that.

Sperling testified that he was released from jail in the 1960's, and Ramos testified that he had been told by Guarino that he, Guarino, was responsible for getting Sperling started on his feet in the drug business in the 1960's.

Ramos further testified that he was present at Phil Kronfeld's on one occasion when there was a conversation between Sperling and Guarino --- excuse me --- Capra, about a shipment of narcotics, and Sperling testified that he worked for Phil Kronfeld's, and that he used to see and converse with John Capra in that store.

In July of 1971, Guarino and Sperling were photographed on 54th and Seventh Avenue.

In September and October of 1972, Guarino, Capra

and Sperling were photographed at that same location.

Finally in mid-March of 1973, Herbert Sperling makes the big time. He formally joins up with Leo Guarino, the man with the connections for importing the stuff, and his business partner, John Capra, as testified to by Joseph Conforti.

And you will recall that Conforti told us that before this new partnership merged, that the most narcotics he used to handle at one time for Sperling was one and a half to three kilos, and after Sperling joined up with Guarino and Capra, that all changed.

On April the 7th of this year he said that he and John Caruso tested and mixed eight kilos of pure heroin.

On April 10th and 13th, he testified to mixing more pure heroin. And Conforti's registration cards -- remember the registration cards from the hotels that showed that he was in fact in those places when he said he was?

And what did Mr. Slotnick do in this regard?

Remember when he had Joseph Conforti sit on the stand and write his name and address out? Because he thought that Joseph Conforti was lying when he said he wrote --

MR. SLOTNICK: Objection to what I thought, your



Honor.

THE COURT: Yes, what counsel think doesn't matter. Just tell what happened.

MR. PEPPER: And what happened, ladies and gentlemen? That handwriting was passed to you to examine and to compare with those hotel registration cards, so I am sure you will all remember the results of that little test.

In addition, you will recall that Mr. Henderson took the stand and testified -- he is a chemist -- that in those very rooms were found heroin traces.

And on top of all this, we have the narcotics paraphernalia on the table that Conforti used to test and cut and dilute and mix narcotics for Capra, Guarino and Sperling.

Now, one final point with respect to Mr. Conforti. A lot has been said this morning that Conforti testified from hearsay, that he had no personal knowledge, no personal knowledge whatsoever of Guarino and Capra engaged in narcotics.

Well, let's see if that is true.

Page 2427 of the transcript:

"Q Did Capra, Hooks, say anything to you at this point?

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"A They were telling Herbie for me to go home because they didn't want me to get burned, meaning that if somebody was watching them, they didn't want them to know that I was mixing the heroin."

2428: "Q Did you overhear any portion of that conversation?

"A Leo was telling Herbie, well, we need the money to get this deal going or connection that they were involved with, so Herbert turned around to me and says, 'Joey, do me a favor, run to my house, go to my house, go to my wife's closet and pick up \$30,000,' and there was a bag there containing 40, 'just leave 10 behind'".

2429: "Q What took place when you arrived?

"A When I arrived, I had the bag in my hand" -- this is when he is coming back, carrying the \$30,000 -- "so Leo turned around and he says, 'If the kid's going to carry money, make sure that he doesn't carry it in the open. Make sure he puts it in his pocket or underneath his jacket.'"

And 2425 -- excuse me 2445:

"Q And did you overhear conversation between Guarino and Sperling at that time or a portion of the conversation?"

This is the conversation on April 13th at Sperling's house.

2            "A   He said things are looking up, we're going  
3 to have a good year, something about a connection being  
4 made, and when I walked towards him they broke up."

5            About a connection being made. Is that  
6 shylock conversation, ladies and gentlemen?

7            Now, who else was arrested in the early morning  
8 hours of April the 14th, 1973, coming out of the Bachelor's  
9 Three Restaurant in Manhattan?

10           Stephen Dellacava.

11           And what was found in the trunk of that 1973  
12 Oldsmobile?

13           A heat sealing machine, a heat sealing machine  
14 used to seal plastic bags.

t4b

Mr. Feitell charged that this machine can be purchased at just about any department store and in fact some of you may have your own sealing machine. But do you carry it around in the trunk of your automobile at 2 o'clock in the morning?

Of course, it is conceivable that Dellacava had just come from a picnic and wanted to use this machine to seal some picnic bags. But if that doesn't make much sense, you can disregard it completely, you have the heroin tracings.

MR. FEITELL: I object to that, there was testimony of a trace.

THE COURT: Do you mean in the gym bag?

MR. PEPPER: The one in the trunk of the car, right next to it.

MR. FEITELL: Trace. The testimony was a trace.

THE COURT: The jury will recall the testimony about the use of those words and so on.

MR. PEPPER: You recall Mr. Henderson used the word trace to refer to heroin traces, that he explained. Inside his gym bag what else was found in addition to the trace? \$14,000 in cash or close to it that I am holding in my hand now.

In two years Dellacava has gone from paper bags

2 to toilet kits to gym bags because if you remember in  
3 1969, the testimony that Beansy used to come up with a  
4 bag to the Haverneyer Club, with paper bags, full of money  
5 and what have we got at the Haverneyer Club? He gave the  
6 money to John Capra and what did Capra do? He used to  
7 sort the money, place them in thousand-dollar stacks.  
8 That, ladies and gentlemen, may be one of the reasons why  
9 this money was not sorted out properly at that time.

10 Of course, Dellacava's name does not appear on  
11 that gym bag as Mr. Feitell brought out. You may  
12 find that perhaps he purchased that gym bag from somebody  
13 else and that the seller forgot to remove \$14,000 in cash.  
14 But you may also find that those heroin tracings were  
15 left over, left over from the prior Christmas, from the  
16 Christmas present to Jack Brown from John Capra.

17 Before closing I want to refer briefly to  
18 Government Exhibits 134 and 134A, the toll record sheets.

19 First, you recall Mr. Stone indicated that the  
20 name Alvin Norris appears on these toll slips and that the  
21 address of Norris is 15416 Burwick Street.

22 Now, let us see if we can figure out this  
23 strange guy Alvin Norris.

24 Ladies and gentlemen, Government Exhibit 78 shows  
25 a Mr. A. L. Morris in the Sheridan Beach Hotel and the

address, 15415 Burwick Street, Detroit, Michigan.

The registration card also at the Holiday Inn in Toledo has the name of Morris, the same address.

It is not that unusual for Mr. Morris to use strange names or false names. You recall that in Detroit, he was registered under the name Alan Schwartz.

It just so happens, ladies and gentlemen, that there are telephone calls between this guy Norris, many of them and Jermain and Simone and the Allerton Fish Market. Some coincidence.

Is there any question in your minds that Alvin Norris is sitting at the end of that table?

Let us take the date of November 5, 1970.

I am referring now to Government Exhibit 134A. You do this yourselves with other dates. What do we see on November 5, 1970?

Telephone calls Simms to Jermain, Jermain to Simone, Simone to Jermain, Jermain to Simone and Jermain to Simone and Simone to Guarino, that is, later in the day.

Jermain makes a call back to Simone.

What happened on November 5 and 6, ladies and gentlemen? Isn't that when a kilo of narcotics went down to Tom's Villabianca Restaurant?

You may find that these calls were made by their wives or the children of these people.

Of course, there are toll calls here between the Allerton Fish Market and George Harris in Detroit.

You will recall that Ramos testified that the Allerton Fish Market is a place that George Harris and Morris were supposed to call in to locate Jermain and Ramos.

Of course, it is conceivable that George Harris and Morris liked Fish and they used to call the fish market in the Bronx for that purpose.

But you may also find that these two men called that number in the Allerton Fish Market for one purpose and that purpose was to locate Jermain and Ramos when they wanted drugs.

Ladies and gentlemen, the government submits that the evidence in this case is overwhelming. It doesn't rely, as defense counsel asserted, on the testimony of one or two people.

When you add all of this up, and you give Capra, Guarino, Dellacava, Jermain, Harris and Morris every benefit of the doubt they are each entitled to under the law, you still reach the inevitable conclusion that each of these men are guilty, guilty of violating the Federal Narcotic Laws.

One last observation: I think that each of you will be less than human if you didn't feel some degree of sympathy for these men on trial. However, you must decide this case under the oath that you took as jurors without fear or favor, without bias or prejudice to either the government or to the defendants and, in closing, ladies and gentlemen, I ask you to submit a verdict of guilty on each and every count as to each and every defendant. Thank you.

THE COURT: We will take a 10-minute recess before I charge the jury.

(Jury left the courtroom.)

MR. SLOTNICK: I have an application to make for a mistrial in view of Mr. Feffer's characterization of the heroin dosage at the beginning of his comments, about the cocaine not being profitable enough and I feel that this summation was not fair comment. On this basis I move on behalf of John Capra for a mistrial.

THE COURT: Well, let me say that you preserved earlier the right to object and you quite properly did that, both you and Mr. Blackstone. If you had an objection about this you should have made it earlier, but, in any event, your application is denied.

MR. LEVENSON: Your Honor, I just submitted for



very --

THE COURT: I am not going to rule on anything at this time, Mr. Levenson. I have looked at them and whatever I have done with those tardy requests will be incorporated in the charge, as you review it.

MR. STONE: Mr. Morris joins in the application for a mistrial and also points out to the Court the word smokescreen which are derogatory statements alluding to the defense position in this case and I think this exceeds fair comment.

THE COURT: All right, anything else, gentlemen?  
All denied.

(Recess.)

(Jury present.)

CHARGE OF THE COURT

THE COURT: (Frankel J.) Now, Mr. Edgehill and ladies and gentlemen of the jury. I note it is exactly a month since you heard the first witness in this case. All the efforts of counsel in the day since October 19 culminate now as we approach the critical and ultimate stage of this case, the time when the case will be given to you for your decision, reflecting your efforts to discover the truth about the events that gave rise to this case.

It is a time for me to remind you very briefly of a number of our different and separate functions and the general nature of your critical responsibilities.

It is my task, it is the trial Judge's task to rule during a trial on issues of law, to make procedural rulings when there are questions about what evidence should come before the jury and how that evidence should be received.

Your task, as I have said more than once, is the crucial one, the one which is the end objective of any trial in our Courts, the decision of issues of fact presented by this case.

So it is for you to judge the witnesses, weigh the evidence, assess their credibility, draw the inferences

that you find are the correct inferences to be drawn from the evidence you have heard, all of that, and you will remember in this connection the efforts that went into your selection, all of that is to be done coolly, with detachment, without bias or prejudice for or against either side, with an objective frame of mind, not without interest but disinterestedly and impartially.

You would know without my repeating it that this is a very serious business. The administration of criminal law is not a game and so it is no concern of anybody anymore who objected when and to what and whose objections were sustained and whose were overruled and how many of each happened to whom.

It is, as you know, the duty of counsel, in the judgment of counsel, to interpose objections when his judgment leads him to believe that he do so properly. The duty of the judge is to rule on those objections. We are all trained in a forensic and somewhat contentious profession as you know and sometimes the tones get loud and people get testy and people includes in most cases Judges.

But all this is past now and nothing about tone of voice or rulings or attitudes or occasional flashing of mild passion is of any consequence anymore.

Now it is your task and your sovereign task as all of you have been told, to judge the evidence and to seek the truth from it.

It is my job to tell you the rules of law that govern the charges in this case and that govern your deliberations.

It is your responsibility in a fair system of justice to follow these instructions faithfully.

I don't make them up, they come to me from the Congress or from higher Courts. If I give you any instruction that is erroneous, it is on the record and can be corrected. If you deviate from the instructions, then that won't be on the record and that cannot be corrected.

So to run a system of law and not arbitrariness, we have to expect that the jurors will follow the rules of law given to them in instructions like these.

I have told you you will seek the truth and you will seek it from the evidence. I told you at the outset what evidence is and some of the things that it is not. Let me remind you of some things that are not evidence.

The indictment which tells the defendants what they are accused of and tells everyone ultimately what the issues on trial are, the indictment is not evidence.

It is just a set of accusations.

Nothing that has been said to you by counsel is evidence though, as you know, they have a purpose in arguing about the evidence to you. Similarly, nothing that I have said to you or may say to you in these instructions, is evidence. And nothing I said or may have said should or may be taken as importing or suggesting any view of mine on any of the factual issues in the case.

It is not for me to have a view and it is not for you to guess about conceivable views or speculate about them, I have none; the views of the evidence are for you.

So if occasionally in the course of the trial I have put a question or made an inquiry, it should not indicate to you, because it is not meant to indicate and does not indicate, any opinion or thought of mine about what the evidence shows or does not show. All such judgments are for you.

Similarly again you will note that occasionally these instructions will make brief reference to factual assertions or factual issues. Remember that I am not going to do anything remotely resembling another summary of the evidence added to the many hours of summation you just heard.

1  
2 IF I refer to evidence or an assertion about  
3 the evidence, it is simply to help define any issue for you,  
4 to help formulate one or another of the problems that you  
5 will confront in the jury room. In doing that, my  
6 references to the evidence will be illustrative, they  
7 will be incomplete, they may not seem balanced because  
8 incomplete references of this kind are not often  
9 balanced. But remember they are not summaries and if they  
10 seem to stress one side more than another, you may surely  
11 believe two things:

12 First, that that is not what I intended and,  
13 second, it is of no consequence to you.

14 My occasional references to the evidence and to  
15 the arguments about it, as I say, are simply to help  
16 formulate one or another of your problems and to help you  
17 as you soon proceed to your deliberations.

18 Remember, of course, what is the evidence is  
19 primarily the sworn testimony you have heard from the  
20 witness stand, it is exhibits, and it is the few facts  
21 that you have heard from time to time stipulated to or  
22 agreed upon or undisputed.

23 Now, in response to this indictment, which is  
24 not evidence, the defendants on trial here have each  
25

pled not guilty. That means that the burden has been placed upon the government to prove guilt beyond a reasonable doubt before any one of these defendants may be found guilty of any of the charges before you.

That is a burden that never shifts. It is not to be determined by the number of witnesses or the length of the testimony on one side or the other. Whether the burden is sustained is a question that you will answer based on your overall appraisal of this record taken as a whole, of the persuasiveness or lack of persuasiveness of all the evidence, taken together in your review of what you have heard and seen in this trial.

As a corollary of the government's burden of proof in a criminal case, it is also the law that a defendant in a criminal case is not required to prove his innocence. To put this more completely, a defendant in a criminal case is not required to adduce proof of any kind. He is, as you have heard, recalling a basic principle in our law, presumed to be innocent. That presumption existed for these defendants when the trial started, it has remained in their favor throughout, it will be with them when you proceed to the jury room.

It is enough in itself to require you to acquit

1 unless or until you are convinced of guilt beyond a  
2 reasonable doubt.  
3

4 As a corollary of that principle, since they are  
5 not required to produce any evidence of any kind, and for  
6 other reasons that we don't need to tarry over, defendants  
7 in criminal cases have an absolute and unqualified  
8 right in our system to decide for themselves and with  
9 counsel whether or not they will take the witness stand.  
10 They have a right to refrain from taking the stand and to  
11 rely on their cross examination of the government's  
12 witnesses and such other evidence as they may choose to  
13 present.  
14

15 Accordingly, to preserve their basic right in its  
16 full substance, you must remember that the defendants  
17 are not to have any inference drawn against them from their  
18 decision not to take the witness stand in this case.  
19 That fact should not weigh in any fashion in this case.  
20 It should not enter into your deliberations.

21 I have talked to you about the burden of  
22 proof beyond a reasonable doubt and all of you have heard  
23 of it surely before today.

24 We must try to give some content to that notion  
25 and I proceed to that now.

When we speak in our system of criminal justice



1  
2 of a reasonable doubt, we mean to begin with what the  
3 words attempt to convey, a doubt founded on reason and  
4 arising from the evidence or lack of evidence in the case  
5 before you.

6 It is a doubt that has substance and is not  
7 merely shadowy, a reasonable doubt is one that takes its  
8 origin in your judgment, in your common sense and in your  
9 experience applied to the record of evidence in the case  
10 before you.

11 It is not an excuse to avoid performing an  
12 unpleasant duty. It is not a means for extending  
13 sympathy to a defendant.

14 A reasonable doubt is the kind of doubt that  
15 would cause a prudent person to hesitate before taking  
16 action in some matter of importance to himself. To  
17 elaborate on this a little bit, if you in your own personal  
18 affairs were confronted with a decision of consequence and  
19 if you proceeded then to review all the factors and  
20 considerations bearing on that decision rationally and  
21 objectively, and if after that you found yourself beset by  
22 uncertainty and unsure of your judgment, then you would  
23 have what we try to define here as a reasonable doubt and  
24 the converse of that is also true.

25 If you had such a serious decision to make, and

1       you engaged in such a detached and rational review of  
2       relevant considerations, and, if after that, you found  
3       you had no uncertainty and no reservation about your  
4       judgment, then you would not have a reasonable doubt.  
5

6               Proof beyond a reasonable doubt does not mean  
7       proof to a positive certainty or beyond any conceivable  
8       doubt. If it meant that nobody could ever be convicted  
9       in a criminal case where there were issues of fact to be  
10      decided. It is in the nature of issues of fact and most  
11      clearly of issues of historical fact, things that happened  
12      in the past, that such issues cannot be determined with  
13      absolute or mathematical certainty.

14              So that kind of certainty is not what we mean when  
15      we talk about proof beyond a reasonable doubt.

16              On the other hand, I hope that these observations  
17      about that basic concept have made clear to you that in a  
18      criminal case the prosecution's burden of proof is a very  
19      high one and that you may convict only if your mind is free  
20      of the kinds of uncertainty and kinds of reservations I  
21      have undertaken to describe.

22              With those basic principles in view and I will  
23      supplement them later on in this charge that can't be  
24      brief, let us approach the specific accusations in this case  
25      and move toward the specific problems presented by this trial.

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for your decision.

You know the indictment contains five counts or charges of criminal offenses. Each of these counts, as we call them in the law, is a separate accusation of a separate offense or crime. And so, as you come to your efforts to decide them, remember that each calls for a separate determination by you and, in addition, that in each case you will have to make a separate determination as to each separate and individual defendant. That is a thought that we will touch or repeatedly as we go through these instructions.

t5pm

SOUTHERN DISTRICT COURT REPORTERS

UNITED STATES COURT HOUSE

FOLLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLAND 7-4580

Now, the indictment, as you will have it before you for your guidance, and as a sort of checking document, but not of course as evidence, names 11 defendants.

You know that only six of those so named have been involved in this case.

You know therefore that these six individuals are the only persons whose guilt or innocence will be your concern in the jury room.

Remember that in our system questions of guilt or innocence are personal and individual.

We don't follow doctrines of guilt by association. And so, as I say, the guilt or innocence of each of these separate defendants must be determined separately under each count that names him with respect to him, and eventually, on the significance of the evidence or the absence of evidence that you are permitted to consider against that particular defendant.

Now still describing it generally, before we get to its particulars, let me point out to you that the first count names the six defendants here on trial as defendants, and charges them with a conspiracy during a period from 1969 to 1973, a conspiracy that I will particularize later on, but in general, an alleged conspiracy to violate certain Federal laws relating to dealings in

narcotic drugs.

That counsel have referred to and I will refer to for shorthand as the conspiracy count.

Then the remaining four counts, numbered 2, 3, 4 and 5 each charge specific violations of a particular narcotics law, and these are called, and you may have noted these references, these are called the substantive counts.

Now those counts, 2, 3, 4 and 5, involve four of the defendants here: Mr. Capra, Mr. Guarino, Mr. Dellacava and Mr. Jermain.

The remaining two defendants, Mr. Harris and Mr. Morris, are named only in the conspiracy count as defendants, and that, as I said, is the first of the five counts before you.

Now, let me try to outline a little more, and still preliminarily, the nature of these charges, and I will give you a distinction that may be useful as we go along, between the concept of conspiracy, which is involved in Count 1, and the concept of a substantive offense involved in Counts 2, 3, 4 and 5.

In our system, the gist of the idea of conspiracy is an agreement to seek some unlawful objective. The agreement, and I will expand on this when I tell you fully

1  
2 about Count 1, the agreement is the heart of the matter  
3 in this criminal concept, and so there may be a conspiracy  
4 even though the objective of that conspiracy is never  
5 accomplished or completed or carried out.

6 Let me take an example that I trust has nothing  
7 to do with this case, I believe has nothing to do with  
8 this case, merely for illustrative purposes.

9 You might have a conspiracy among two or more  
10 people to rob a bank, that is, they might agree together  
11 to rob a bank, and then they might take one or more steps  
12 to carry out that conspiracy. But they might never get  
13 around to the point of actually completing or accomplishing  
14 the robbery.

15 In that case, that purely hypothetical case,  
16 you might have the crime of conspiracy established even  
17 though the robbery never occurred. And in that setting, the  
18 robbery would be the substantive offense, and the agreement  
19 to accomplish it would be the conspiracy.

20 And I give you that, as I say, merely for  
21 illustration and perhaps to help with some shorter references  
22 as we go along in these instructions.

23 I am going to talk to you a little bit about  
24 the statutes, the Congressional enactments involved in this  
25

case.

In our Federal national system --and I think in substantially all the States -- there are no crimes except as they are defined or created by statute, by laws written by Congress.

And so in this case, as in all others, the charges, the accusations against these defendants are made under certain Federal enactments, laws passed by the Congress.

It is not going to be necessary for you any more than it is for any of us to memorize or know the words of any of these laws.

Nevertheless, I think it will help as background for your later understanding to give you a basic description of the laws that are involved in this case.

And there is a small complication that has to do with time because of a change in the law about which I will also tell you.

Because of the period that concerns us, extending overall from 1969 to 1973, we are concerned basically with two Federal laws, one that was in force for some years, ending on May 1, 1971; and then another, which replaced that earlier law, and became effective on May 1, 1971.

2 As I will indicate to you, this is, in the  
3 end, much less complicated than it starts out sounding.  
4 Nevertheless, I am going to give you this background so  
5 that some of the things I say later and some of the things  
6 I will read from the indictment will perhaps make more  
7 sense to you.

8 Now the law in effect in the years 1969, '70 and  
9 up to May 1, 1971, contained certain provisions in Title 26,  
10 which is our Tax Code, and specifically Sections 4705(a)  
11 and 7237(b) of that title. You don't have to remember  
12 those numbers. But basically, and quoting only a very little  
13 bit, those provisions made it a crime for any person to  
14 sell, barter, exchange or give away narcotic drugs except  
15 in pursuance of a written order of the person to whom such  
16 article is sold, bartered, exchanged or given, on a form  
17 to be issued in blank for that purpose by the Secretary of  
18 the Treasury or his delegate.

19 And I have been quoting from that statute.

20 And as you will see soon, the conspiracy charge  
21 in this case and two of the substantive counts relate  
22 to alleged violations of that statute.

23 Now then, effective May 1, 1971, these pro-  
24 visions involving that requirement of an order form were  
25 replaced by others which were part of an enactment that is



known as the Comprehensive Drug Abuse Prevention and Control Act of 1970, another act name you don't have to remember.

These new provisions are contained in certain sections of Title 21 of the United States Code, and specifically, though you don't need to know them, that explains why you will hear references I believe to numbers like Section 812, Section 841(a) (1), and Section 841(b) (1) (a), as I read through parts of this indictment.

Now, these provisions, effective May 1, '71, forbid the distribution or the possession of with intent to distribute certain kinds of narcotic drugs in schedules of so-called controlled substances. Heroin is among those, and it is in Schedule I. Cocaine is among those, and it is in Schedule II.

Very simply described, these provisions make it unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute any controlled substance, such as heroin or cocaine.

Now, under the law, both pre-May '71 and post-May '71, it has been a crime to conspire to violate either of those provisions.

With that statutory framework in view, let me again outline, and then go specifically to the charges in the indictment.

2 Count 1, as I have said, charges a conspiracy  
3 during a period '69 to '73. It charges that the conspiracy  
4 had as objects violation of both the old statute preceding  
5 Mayll and of the new statute following May 1, 1971.

6 Count 2 alleges a substantive crime, an unlawful  
7 transfer without an order form, in August 1970. That is  
8 alleged under the old law which was in effect in that year  
9 and as I have said to May of 1971.

10 Similarly, Count 3, which charges a violation  
11 in November 1970, is laid under the old law.

12 Counts 4 and 5 charge violations in October of  
13 1971 and November of 1971, and both of those substantive  
14 charges are under the new provisions of Title 21 that I  
15 have mentioned to you.

16 Because the conspiracy charge in Count 1 alleges  
17 an unlawful agreement to violate both the old statute and  
18 the new, and because those statutes are involved respectively  
19 in the four substantive counts, it becomes simplest, I think,  
20 and most economical of repetition, of which there is  
21 inevitably some, if I proceed in these instructions now to  
22 tell you the rules and the problems under Counts 2, 3, 4  
23 and 5, the substantive counts, and then go back, after  
24 that, and give you the instructions required  
25

relative to Count 1, the conspiracy count; and I am going to proceed in that fashion.

In each case I am going to read to you the counts of the indictment about which I am giving you these instructions. As I say they will be with you, but I think it gives some concrete meaning to have these read before we proceed to the statement of the necessary elements and other rules relating to these accusations.

Count 2 reads as follows: "The Grand Jury charges: In or about the month of August 1970, in the Southern District of New York" -- well, let me stop there for a minute and mention to you what you may know. The Southern District of New York embraces the counties of Manhattan, the Bronx, Westchester, and other counties moving upstate, in some of which, if I recall, some of you may live.

Each of these counts in this indictment charges violations of law occurring within the Southern District of New York.

I think the summations have made pretty clear to you that that is not a subject of primary concern or dispute, but in any event I mention that to you and I mention to you that you could not find a crime having been committed in this District unless the criminal conduct you found

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beyond a reasonable doubt occurred, as it is alleged, within the Southern District of New York.

Let me go back: In or about the month of August 1970, in the Southern District of New York, John Capra, Leoluca Guarino, Stephen Dellacava and Robert Jermain, the defendants, and co-conspirator Joaquin Ramos, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to Alan Morris approximately two kilograms of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of written order of the said Alan Morris, on a form issued in blank for that purpose, by the Secretary of the Treasury of the United States or his delegate.

You will notice the charge that I have just read alleges a sale or giving to Alan Morris, who is a defendant in the first or conspiracy count, but he is not a defendant, though he is named as the buyer, in this substantive count, Count 2.

Count 3 reads this way: On or about the 6th day of November 1970, in the Southern District of New York, John Capra, Leoluca Guarino, Stephen Dellacava, and Robert Jermain, the defendants, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to George Harris approximately one kilogram of heroin, a narcotic drug,

1 in that the said sale, barter, exchange and giving away  
2 was not in pursuance of a written order of the said  
3 George Harris on a form issued in blank for that purpose  
4 by the Secretary of the Treasury of the United States or  
5 his delegate.

6 What I said about Morris under Count 2 applies  
7 to Harris in Count 3. He is named as the recipient or  
8 buyer, but he is not a defendant in this count. The four  
9 defendants, Capra, Guarino, Dellacava and Jermain are the  
10 only ones named in each of the substantive counts.

11 Now, in order to prove guilt under either of  
12 these counts, the Government is required to have established  
13 beyond a reasonable doubt each and every one of five essential  
14 elements. When I say each and every one, I mean just  
15 what those words convey. If anyone is not established  
16 beyond a reasonable doubt, you must acquit.

17 The five essential elements are these: First,  
18 that on or about the dates charged in each of these two  
19 counts the defendants named wilfully and knowingly either  
20 sold or bartered or exchanged or gave away a narcotic  
21 drug. You will notice I put "or" between each of those  
22 verbs or participles, and I tell you it is not necessary  
23 for the Government, in spite of the form of the indictment,  
24 to prove more than one of those prohibited kinds of acts.  
25

1  
2 If you find a selling or bartering or exchanging or  
3 giving away, that is sufficient to establish this first  
4 element.

5  
6 Second, that the substance referred to in each  
7 of these counts was in fact a narcotic drug, and specifically,  
8 heroin.

9  
10 Third, that the narcotic drug was either sold  
11 or bartered or exchanged or given to the defendant Alan  
12 Morris in Count 2 or the defendant George Harris in Count  
13 3.

14  
15 Fourth, that Alan Morris, in the transaction  
16 alleged in Count 2, and George Harris, in the transaction  
17 alleged in Count 3, did not give to the defendants Capra,  
18 Guarino, Dellacava and Jermain, the alleged suppliers,  
19 directly or indirectly, any written order for the  
20 narcotic drug on a form supplied by the Secretary of the  
21 Treasury or his delegate.

22  
23 Fifth, that the defendants named, in selling  
24 or bartering or giving away the heroin charged in each of  
25 these two counts acted knowingly and wilfully.

Now, those five essential elements I think are  
for the most part self-explanatory, and I won't elaborate  
especially on most of them.

1  
2 But let me at this point talk to you a little  
3 about a concept that is applicable throughout the case,  
4 and then give you an additional item of instruction,  
5 bearing specifically on these two substantive counts  
6 numbered 2 and 3.

7 You will recall in what I have just read that  
8 the fifth essential element requires proof that a defendant  
9 was acting knowingly and wilfully on the occasions in ques-  
10 tion. Those words, knowingly and wilfully, which appear  
11 in the indictment, and appear commonly in instructions,  
12 refer to the element of criminal intent in this case, with-  
13 out which there could be no conviction.

14 So the words are important.

15 However, they are not mysterious, and their  
16 definition is not especially complicated.

17 In order to have acted knowingly and wilfully,  
18 a defendant must be shown to have acted deliberately, pur-  
19 posely, intentionally, not as a result of mistake or  
20 accident or inadvertence.

21 The defendant need not be shown for this purpose  
22 to have known that he was violating some particular law  
23 or to have known the terms of any law applicable to his  
24 conduct. But he must be shown to have been acting with  
25

a bad or evil purpose in the sense that he knew he was engaging in narcotics dealings forbidden by the criminal law.

These qualities of knowledge and wilfulness need not be and commonly can't be proved by so-called direct evidence. They relate, as you know, to the state of a person's mind, and normally, though the state of someone's mind is a fact, it is a fact that we can't get at by direct sensory observation, and so here, as in most cases, and as in your daily life when you are trying to figure out the intentions or motives or purposes of people, you must rely on circumstantial evidence.

Your task will be to weigh all the facts and circumstances surrounding these defendants and the events in question, to decide whether they or any of them, at those times in question, behaved knowingly and wilfully.

You may consider whether you find circumstances of secrecy or intrigue or deviousness or attempts at concealment. You may on the other side consider whether the conduct in question occurred openly and without any attempt at concealment or subterfuge.

You will consider such things, and as I have said, all the circumstances that have been laid before you in this case in deciding this essential question of criminal



intent, in deciding whether one or more of these defendants has been proved to have been acting knowingly and wilfully.

The situation is different elsewhere in the case, but you will recall that in connection with its attempts to prove Counts 2 and 3 of this indictment, the Government has not produced the heroin which is alleged to have been transferred on the occasions to which those counts refer.

I instruct you now that the law does not require that accusations of this kind must fail unless the narcotic or other substance is physically produced in court.

As with other facts in criminal or civil litigation, the Government is permitted to undertake to prove a fact of this nature by circumstantial evidence, and the contention of the prosecution in this case is that the necessary proof has been made in that fashion.

As you know without summarizing, but simply referring you to the evidence involved here, the Government relies on the testimony it has produced as to the specific events that it says occurred in August and November 1970 in order to establish that at those times there were sales to Alan Morris and George Harris respectively and that what was sold was heroin in approximately the amounts charged in each of the Counts 2 and 3.

1                   The prosecution also invokes, as you have heard  
2 evidence as to the transactions which is claimed to show  
3 that they were conducted with secrecy, with deviousness.  
4 It relies on evidence which it claims to have shown other  
5 alleged dealings in a white powder, shown to have been  
6 heroin. It relies on the prices allegedly involved in the  
7 transactions and on the alleged absence of complaint by  
8 the alleged customers.  
9

10                   These are items, as I say, of circumstantial  
11 evidence. It is for you to decide whether the Government  
12 has proved beyond a reasonable doubt that the material  
13 involved in those two alleged transactions, or either of  
14 them, was heroin. If you are not satisfied of that as to  
15 either count, then of course you must acquit on that count,  
16 and if that is true of both, you must acquit on both.  
17

18                   Now let me come to the second pair of substantive  
19 counts, Counts 4 and 5, both of which are alleged under the  
20 law effective May 1, 1971.

21                   Again, four of the defendants are involved here,  
22 Messrs. Capra, Guarino, Dellacava and Jermain. Mr. Morris  
23 and Mr. Harris again are not named as defendants in these  
24 two.  
25

                  Let me read you these last two substantive  
counts.

Count 4, the grand jury further charges in or about the month of October 1971, in the Southern District of New York, John Capra, Leoluca Guarino, Stephen Dellacava and Robert Jermain, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 5-1/2 kilograms of heroin.

Count 5. The grand jury further charges in or about the month of October 1971, in the Southern District of New York, John Capra, Leoluca Guarino, Stephen Dellacava and Robert Jermain, the defendants, unlawfully, intentionally, and knowingly did distribute and possess with intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

Under each of these two counts, before you may convict on either, the Government must have proved beyond a reasonable doubt each and every one of three essential elements, and these are the three:

First, that the substance the Government claims to have been involved in these transactions was a narcotic drug controlled substance, specifically heroin in Count 4, and cocaine in Count 5.

Second, that on or about the dates alleged, the defendants distributed or possessed with intent to distribute

1 the substance in question.

2  
3 Third, that the defendants acted knowingly  
4 and wilfully.

5 I want to elaborate briefly on at least the  
6 first two of these three essential elements.

7 As to the first, the Government alleges that the  
8 substances transferred in these two counts were in fact  
9 narcotic drug controlled substances. As far as the law  
10 is concerned I charge you simply that heroin is a Schedule  
11 1 narcotic drug and cocaine is a Schedule 2 narcotic drug  
12 controlled substance.

13 With respect to these counts, the Government  
14 has produced the alleged heroin and cocaine which it says  
15 was involved.

16 If you find beyond a reasonable doubt that the  
17 Government has proved by the testimony of the chemists  
18 that Exhibits 68A through 68K relating to Count 4 is  
19 heroin, and that Exhibit 68L, relating to Count 5, is  
20 cocaine, then this element, the nature of the substance,  
21 is satisfied as respects each of the counts with respect  
22 to which you make such a finding.

23 As to the second essential element in Counts 4  
24 and 5. The charge is that the defendants distributed or  
25 possessed with intent to distribute the narcotic drug

controlled substance in question.

Distribution in this setting, in the circumstances of this case, means simply selling or delivering or transferring.

As to the notion of possession, and possession with intent to distribute, let me say a few words about the meaning of that first word "possession" in this setting.

Basically, to begin with, the word possess has an every-day meaning familiar to you, referring to the having of some object within one's control.

Possession may be of two types, actual or constructive.

Now actual possession means personal, manual, physical control of the thing in question.

Constructive possession exists if the things or thing are or is in the physical possession of some other person, but the defendant or the person alleged to have constructive possession has the power to exercise control over that other person and over the thing or things, over their distribution, over their movement, over their delivery.

In other words, to possess something constructively, you need not have it in your hand or in your pocket. If it is within your power to exercise control over the

1  
2 thing --- and in this case the subject is drugs -- you have  
3 constructive possession of that thing.

4 Specifically, to speak in terms of what the  
5 Government contends and what you may find to have been proved  
6 or not proved, the contention is that the transportation  
7 of the 5-1/2 kilograms of heroin to Toledo, Ohio, as  
8 charged in the fourth count, was allegedly done pursuant  
9 to the direction or with the participation of Capra,  
10 Guarino, Dellacava and Jermain.

11 If you find that kind of direction and control  
12 beyond a reasonable doubt, this would satisfy the requirement  
13 of possession within the meaning of the statute.

14 The defendants contend, on the other hand, that  
15 the Government has failed to prove beyond a reasonable  
16 doubt that they had any connection with this shipment and  
17 any possession of the narcotics in question, whether con-  
18 structive or otherwise, and that, very briefly, puts one  
19 of the key issues for your decision in this case.

20 As to the third essential element in Counts  
21 4 and 5, again, the defendants must be found to have  
22 acted knowingly and wilfully.

23 I talked to you about the meaning of those words  
24 under Counts 2 and 3, and I simply say that what I said  
25

1  
2 in that connection applies again here.

3 In connection with all four of the substantive  
4 counts, the counts numbered 2 through 5, the Government  
5 relies on another statute, another enactment of the  
6 Congress, and a concept in that statute called aiding  
7 and abetting.

8 Now, under that conception and that statute,  
9 it is not necessary for the Government, if the essential  
10 elements are otherwise established, to show that a defendant  
11 himself physically committed the crime in question.  
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1 The law provides in this statute and elsewhere  
2 that a person who aids and abets another to commit an  
3 offense is guilty of the offense as if he had committed  
4 it himself. The government invokes this rule here and  
5 contends that John Capra and Leoluca Guarino should be  
6 found guilty as aiders and abettors of Stephen Dellacava  
7 and Robert Jermain.  
8

9 I instruct you in this connection that you may  
10 find the defendants Capra and Guarino guilty of the offenses  
11 charged in Counts 2 through 5, if you are convinced beyond  
12 a reasonable doubt that Stephen Dellacava and Robert  
13 Jermain committed those offenses, and that the defendants  
14 Capra and Guarino aided and abetted them.

15 To find a person guilty as an aider and  
16 abetter you must of course find something more than  
17 mere knowledge on his part that a crime was being  
18 committed.

19 A mere spectator at a crime is not a  
20 participant and not an aider and an abetter.

21 It is not necessary, however, as I have said,  
22 to find that the defendant himself, accused as an aider  
23 and abetter, did any of the acts charged.

24 How do you determine this? To decide whether  
25 any particular defendant aided and abetted the commission



of an offense, you ask yourselves these questions:

Was he associated with the venture? Did he participate in it in some direct capacity as something he wished to accomplish or bring about? Did he seek by his own action to make that enterprise, the criminal enterprise, succeed? If he did, then you may find that he is an aider and an abetter.

Now, we come back to Count 1 of the indictment, the conspiracy charge. This in its allegations is somewhat longer than the others but I will read it to you anyhow again for a kind of background and introduction.

I am going to read it to you in two installments. I will stop before a heading on the second page of this document called overt acts and later on, for reasons that I think will be apparent, I will come back and read that remaining portion of Count 1. It reads as follows:

"The grand jury charges:

"1. From on or about the first day of July 1969 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, John Capra, Leoluca Guarino, Stephen Dellacava, John Caruso, Robert Jermain, George Harris, Earl Simms, Alan Morris, Joseph Messina, Jack Brown and Carmelo Garcia, the defendants, and Herbert Sperling,

Willie Middlebrook, Harold McSpadden, Joseph Conforti, Jack Spada, Josquin Ramos, Horace Stanley Marabel, Jimma Rosa and Louis Oliveras, named herein as co-conspirators and not as defendants, and others to the grand jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841 (a) (1) and 841(b) (1) (A) of Title 21, United States Code.

"2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount thereof being to the grand jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.

"3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with

intention to distribute schedule I and II narcotic drug controlled substances, the exact amount thereof being to the grand jury unknown in violation of Sections 812, 841 (a) (1) and 841 (b) (1) (A) of Title 21, United States Code."

Then comes the overt acts and, as I said, I will read those allegations to you in a little while.

This first count, I remind you as far as we are now concerned in this case, involves all six of the defendants on trial in this proceeding. Again, before you may find any defendant guilty of the charge of conspiracy in Count 1, the government must have proved each and every one, in the meaning of that phrase, each and every one of three essential elements and here are the three under the conspiracy charge:

First, that for some period of time between July 1, 1969 and May of 1973, when the indictment here was filed, there was a conspiracy of the kind the government alleges.

Second, that the defendants here on trial or one or more of them knowingly and wilfully participated in that conspiracy.

Third, that someone of the conspirators, whether one of those here on trial or any other, committed at

least one of the overt acts set forth in the indictment for the purpose of furthering the conspiracy.

Again, I am going to elaborate and explain each of these three essential elements.

As to the first, the necessity of proof beyond a reasonable doubt that there was a conspiracy of the kind in question, I have to begin with an understanding of the relevant meaning of that term conspiracy.

A conspiracy for purposes of this case may be defined as an agreement or combination of two or more persons by their concerted action to accomplish some criminal purpose. As I said to you earlier, the unlawful agreement or combination is the gist of this crime of conspiracy.

It is often said that a conspiracy is a kind of partnership in crime in which each member becomes the agent of every other member.

Although we use the standard legal terms like agreement and agency, it is obviously not necessary that in this kind of case the government prove a formal agreement or partnership in the usual lawful sense of those terms.

Common sense tells you and the law embraces common sense in this instance, that when people, if they do enter upon a criminal conspiracy, much is left to informal

and unexpressed understanding.

In determining here whether the conspiracy alleged has been shown to have existed, your task will be to judge the total picture of the asserted acts and conduct of the alleged conspirators which the government claims occurred in order to promote in concert the criminal objectives of the unlawful dealings in narcotics.

As I mentioned to you also earlier, since the heart of the matter is the unlawful agreement, a conspiracy may be found to have existed even if its objects or purposes were not carried out. In other words, a conspiracy may exist though it does not succeed.

At the same time, evidence that one or more objects of the conspiracy were in fact achieved may be taken as evidence that the conspiracy in fact existed.

As I said, your task in this case is to take the whole record, take all the evidence together, consider the gaps in the evidence as you may find them to exist, and decide on that total appraisal whether there has been proof beyond a reasonable doubt that two or more of the alleged conspirators agreed expressly or tacitly to pursue the unlawful objects alleged in Count one of this indictment.

The government alleges that there was an overall

1 conspiracy in existence for some portion of the time  
2 from 1969 to May of 1973.

3 The conspiracy is alleged, as you know, to have  
4 had a number of participants including the defendants  
5 here on trial, other defendants who are not here on trial,  
6 and still other people not named as defendants in the  
7 indictment.

8 You know that the government charges and claims  
9 it proved that there were a variety of roles for the  
10 various individuals claimed to have been in the  
11 conspiracy.

12 It is alleged that different individuals may  
13 have been in the conspiracy for different periods of  
14 time, some throughout, some early, some later.

15 Leaving those assertions for you to consider in  
16 your deliberations on the evidence, I instruct you now  
17 and remind you that Count one does charge a single overall  
18 conspiracy and the government must prove such an overall  
19 conspiracy in order to make out the first of the three  
20 essential elements on which I am now instructing you.

21 So if the government has not established such  
22 a conspiracy, but has established only a variety of  
23 different and unconnected conspiracies among  
24 different people, there would be a failure of proof as to  
25

element one under Count one and you would have to acquit on that count.

You will recall in this connection that one object of this alleged conspiracy was the violation of the statute in effect until May 1, 1971.

That is, an object of violating the law requiring that narcotic drugs not be sold or bartered or given away, without the seller or givers receiving a form for that purpose issued by the Secretary of the Treasury or his delegate.

Then it is said that a second object of the conspiracy, and this would relate to the period after May 1, 1971, was to violate the latest statute, the one that forbids the distribution or possession with intent to distribute schedule 1 and schedule 2 narcotic drug controlled substances, and that is, of course, heroin and cocaine.

I have told you that in our system violations of the criminal law must be put in terms of a duly enacted statute and so I have addressed your attention to the statutes that underlie the chronological portions of this accusation of the conspiracy.

At the same time, I think it is fair to say that both before and after May 1, 1971, the basic wrong alleged

by the government in this case, was the unauthorized sale or transfer of dangerous drugs, such as heroin and cocaine, and the basic nature you must find of the conspiracy alleged in this case throughout that period was a conspiracy to engage in the sale and distribution of such narcotic drugs.

Throughout then you must have in mind the kind of conspiracy charged in this case, the fact that only one is charged, and then you must determine with these thoughts in mind, whether that kind of conspiracy has been established beyond a reasonable doubt.

You will consider this problem of chronology I just mentioned not only in connection with this first element but again in connection with the matter of participation or membership to which I will come presently in dealing with the second element of this offense. Before I get to that let me say a few words about the matter of the duration of a conspiracy in our law.

If you find that the kind of overall conspiracy the government charges has been established, the exact length of its existence is not critical.

Let me amplify that just a little bit.

I have read and re-read to you the allegations of the indictment that charge a conspiracy from about the



1st day of July 1969 up to and including the time the indictment was filed in May of 1973.

All I have told you just now is that the government is not required to prove that the conspiracy actually started and existed over the entire course of that period. It is sufficient if you find that the conspiracy has been proved, it is sufficient on this question of duration, if you are satisfied that such a conspiracy existed for such portion of that total period alleged in the indictment.

Now, if you do not find this first element, that the conspiracy existed, your task on count one, as I have said, you must acquit. On the other hand, if you are satisfied that the conspiracy did exist, you reach the second essential element; you reach the question whether one or more of the defendants whose case you are considering were members of or participants in that conspiracy.

This element of membership must be considered and decided with specific and particular reference to each individual defendant upon whom you are asked to reach a verdict. I emphasize once again that in this respect, quite importantly, as in all others, the question of guilt or innocence is individual and must be considered separately

1 with respect to each or different individual.

2  
3 So the participation of any defendant in a  
4 conspiracy must be established by evidence as to his own  
5 words, his own actions, and his own conduct.

6 Of course, each individual person's statements and  
7 actions may and do take on meaning and significance from  
8 the setting in which he acts or speaks.

9 Thus, in this context as in others, you will  
10 consider the behavior, such as you find it to have been,  
11 of each person involved in connection with the behavior  
12 of other people to the extent that such connections are  
13 established to your satisfaction by the evidence.

14 In addition, there are some specific rules  
15 that you have heard fleeting reference to about acts and  
16 declarations of co-conspirators and I am going to talk  
17 about those in a little while.

18 First, let me say that to find that any defendant  
19 was a member of the conspiracy in this case, you must  
20 find that he knew the unlawful purpose or purposes of the  
21 conspiracy and knowingly associated himself with them.

22 The government must establish beyond a reasonable  
23 doubt that any particular defendant you are considering  
24 entered into the conspiracy, aware of its basic purposes  
25 and objects, with a specific criminal intent, that is, with

3/  
1 a purpose of violating the laws against narcotic transactions  
2 about which I have already told you.

3 Mere association with one or more conspirators  
4 does not make a person a member of a conspiracy.

5 Nor is knowledge of a conspiracy without participation  
6 sufficient. What is necessary before you may find member-  
7 ship is that a defendant associated himself, however  
8 informally, with the conspiratorial scheme or plan, knowing  
9 the principal purpose or purposes and intending to act  
10 in some way to bring about the success of the venture.

11 If a person does participate in that way with  
12 knowledge, he may be a member of the conspiracy even if  
13 he only participates in some parts or aspects of the  
14 conspiratorial aims or agreement. He may be a  
15 conspirator in that case even if he doesn't know all of  
16 the other participants, and even if he does not actually  
17 encounter some or all of the others.

18 The question, to repeat it, is whether a person  
19 has voluntarily joined, however informally, in that  
20 conspiratorial venture knowing what it is about and meaning  
21 to participate in the success of the operation.

22 The guilt of a conspirator is not governed by  
23 the extent or duration of his participation, or by the  
24 question of whether he had knowledge of all the operations.  
25

Even if a person joined a conspiracy after it is formed, and engages in it to a degree more limited than the engagement or participation of others, he is equally culpable so long as he might be or is a conspirator within the meaning of these conceptions as I have given them to you.

Each member of a conspiracy may perform different acts, distinct acts at different times and places. Some may play larger, some smaller roles. It is not required, as I say, that a person be in from the very start. He may join while the conspiracy is in progress, and, if he does, he may be held liable for what has transpired before he joined and as well what happens afterwards, while he remains a member.

To be specific about that conception, if you find that the conspiracy as charge existed and that both John Capra and Robert Jermain as the government alleges were members, and if you find that Jermain delivered heroin to Alan Morris during the conspiracy and in furtherance of it, then the acts of Jermain may be found to have been binding on Mr. Capra, even though he was not present at the time of their occurrence.

In short, the question as to membership is did a defendant, any particular defendant upon whom you are

focusing as you consider these defendants separately and one at a time, did he join one or more of the others in the conspiracy, with an awareness of at least some of its basic purposes and aims.

If so, then you may find that he was a full member of the conspiracy, and he may be held liable for all of it, even though his participation was partial as to time or as to the extent of the activities in question.

Now, throughout I keep stressing the importance of your individual consideration of the defendants. You will realize as you try to sort through the evidence and consider the extent, if any, to which the government has proved its allegations, you will realize that the charges themselves against these defendants are separate and different and distinct as to each individual one.

The government claims that the defendants had separate roles and each defendant, and this is important, pleads not guilty to these charges in this and all other respects.

In considering whether the membership element has been established, you will, I remind you, take each defendant, one at a time and consider what, if anything, the evidence shows as to him and, on this kind of basis, make up your mind as to his alleged membership or

1 non-membership, and whether membership as asserted has been  
2 proved beyond a reasonable doubt.

3  
4 I will remind you of this in a little while in  
5 the course of these observations that I now make about  
6 this subject mentioned earlier of acts and declarations.

7 I have told you in a fairly standard legal  
8 conception that in a sense, one conspirator, one member of  
9 a conspiracy, is said to be the agent of every other  
10 member. One of the things that follows from this is that  
11 if a jury finds from a preponderance of the independent  
12 evidence as to each individual alleged member, that people  
13 I shall call for the moment A, B and C are all members of  
14 a conspiracy, then the acts or declarations of A, even in  
15 the absense of B and C, may be taken as evidence against  
16 B and C, provided that those acts or declarations occur  
17 during the conspiracy and in furtherance of it.

18 In considering that rule, which I will try to  
19 finalize a little bit more in a little while, remember that  
20 the rule applies only while any person against whom you are  
21 considering some other persons acts or declarations is  
22 found by you actually to have been a member of the  
23 conspiracy.

24 At any time when any person is not a member,  
25 then no other person's acts or declarations may be considered

against him for any purpose whatsoever, even though they may have been in furtherance of the conspiracy and may have taken place while the conspiracy was in progress.

In this connection I have to tell you about a couple of rules which are not very complex concerning how you measure the duration of a conspiracy, and how you find whether it may have terminated or whether membership of any individual may have terminated. The rules are these:

First, a conspiracy once it has been formed is presumed to continue until its objectives are completed or until there is an affirmative act of termination by one or more of its members; or until it is ended in some other way.

Second, as to any individual alleged to be a member, once a person is found by you to have been a member of the conspiracy, you may find that he continued his membership until the conspiracy ended, unless there is some affirmative proof of withdrawal or disassociation.

And now, you will want to bear those things in mind as I will try to make them a little more concrete by illustration in a little while. But you will want to bear them in mind as you go along in considering whether or to what extent you may consider any acts or declaration of any of these alleged conspirators as binding upon or

affecting any other alleged conspirator.

You should consider in this connection, for example, that the defendant George Harris contends that the evidence against him relates only to the period from February or March of 1970 until December of that year. It is argued on behalf of Mr. Harris that whatever may or may not be shown up to December 1970, he could not be deemed to have been in the alleged conspiracy after that.

t7pm



1           The Government, on the other hand, points to  
2  
3       the introduction of Alan Morris to Jermain and Ramos by  
4       George Harris, and contends that this and other activities  
5       of Morris and other evidence which it claims to have pro-  
6       duced may be found by you to show Harris' continuation as  
7       a conspirator after December of 1970.

8           In addition, the Government relies here on  
9       the concept I mentioned just a while ago, that a person,  
10      once shown to be a member of the conspiracy, may be found,  
11      depending on the jury's judgment in every instance, may be  
12      found to have stayed a member until or unless there is  
13      positive evidence that he withdrew.

14          Now you will consider these contentions as you  
15      think about the case of Mr. Harris, in deciding what if any  
16      acts and declarations of any other people at any given  
17      time may be taken into account by you in deciding the  
18      question of his guilt or innocence.

19          Remember that with him, as with others, for  
20      any time during which you are not satisfied that he was a  
21      member, no acts or declarations of any other people may  
22      be considered against him.

23          Similar considerations, similar principles,  
24      though the details and the circumstances are different,  
25

apply with respect to the defendant Robert Jermain.

As to him, you will recall the arguments that the evidence at most deals with him from somewhere early in 1970 until about November 10, 1971, when Ramos was arrested in New York for his alleged involvement in the Toledo seizure of the suitcase, allegedly containing heroin and cocaine.

Again, the defendant Jermain asserts that nothing after that November time could be deemed to connect him with the conspiracy, and that no evidence of anybody else's actions or statements after that time may be considered against him.

The Government again contends that Jermain's membership in the conspiracy has been shown to extend to November 10, 1971, and that there is no showing of withdrawal thereafter so that you may find he continued to be a member.

Again, for any period where you are not satisfied that he was a member, you may not consider anybody else's acts or declarations against him.

Similar thoughts and instructions apply again in different circumstances to the situation of Alan Morris.

You will recall the undisputed fact that Morris was taken into custody on October 31, 1971. As

2 to him, I give you this very simple instruction. I instruct  
3 you that whatever you find may have been the situation  
4 before that date, before October 31, 1971, you may not  
5 consider against Morris any acts or declarations of other  
6 people occurring after that date.

7 I come now to the third essential element,  
8 the requirement of proof of at least one overt act.

9 If you find that there was the kind of conspir-  
10 acy alleged, and if you find that one or more defendants  
11 were members, you must still find beyond a reasonable doubt  
12 proof of at least one overt act before you may convict.

13 An overt act in this context means very simply  
14 some act committed by a conspirator, one on trial or any  
15 other one, as part of the effort to carry out or accomplish  
16 one or more objects of the conspiracy.

17 The overt act need not be a crime in itself,  
18 but it must, as I say, be something done to further, to  
19 achieve success of the conspiracy.

20 The theory of that, which may or may not interest  
21 you but it is very brief, is simply this, that people might  
22 make an agreement or might talk as though they were agreeing  
23 to violate the criminal law and then they might do nothing  
24 as a step toward carrying that out.

25 It has been thought that if that occurs, only

1  
2 talk of that nature, the result ought not to be criminally  
3 billed. And as a safeguard in our law of conspiracy there  
4 is this requirement of proof of at least one, though there  
5 need not be proof of more than one, overt act.

6  
7 The conspiracy count, Count 1 in this case,  
8 alleges eight overt acts. You will recall that when I  
9 was reading this document of the indictment to you before,  
10 I stopped before this portion. Let me pick up the reading  
11 and read to you the allegations of overt acts.

12 It says: In pursuance of the said conspiracy  
13 and to effect the objects thereof, the following overt acts  
14 were committed in the Southern District of New York and  
15 elsewhere.

16 (1) On or about November 5, 1970, defendants  
17 Robert Jermain, Earl Simms, George Harris, and co-conspirator  
18 Joaquin Ramos, met at Tom's Villabianca Restaurant,  
19 Bronx, New York.

20 (2) On or about November 5, 1970, co-conspirator  
21 Joaquin Ramos met in the Bronx, New York, with defendant  
22 Stephen Dellacava, and negotiated for the sale of a quantity  
23 of heroin.

24 (3) In or about May 1971, co-conspirator Joaquin  
25 Ramos met with defendants John Capra and Leoluca Guarino.

1 jkb-5  
2  
3 (4) In or about October 1971, co-conspirator  
4 Joaquin Ramos had a discussion with defendants John Capra,  
5 Leoluca Guarino and Stephen Dellacava concerning the sale  
6 of six kilograms of heroin and one kilogram of cocaine.

7 (5) In or about September 1971, defendant  
8 Alan Morris and co-conspirator Willie Middlebrook, brought  
9 approximately \$150,000 in United States currency to the  
10 Lincoln Motor Inn, New York, New York.

11 (6) On or about January 17, 1972, co-conspirator  
12 Louis L. Oliveras had a conversation with defendant Leoluca  
13 Guarino concerning the sale of one-half kilogram of heroin.

14 (7) In or about March 1973, defendants John  
15 Capra, Leoluca Guarino, John Caruso, and co-conspirators  
16 Herbert Sperling, Jack Spada and Joseph Conforti, went to  
17 the vicinity of the Stage Delicatessen, Seventh Avenue  
18 and 54th Street, New York, New York.

19 (8) In or about April 1973, defendant John  
20 Caruso transported approximately six kilograms of heroin  
21 to a motel on Long Island, New York.

22 Concluding the essential elements of this con-  
23 spiracy charge, then I remind you simply that before you may  
24 convict, at least one of those eight overt acts must be  
25 proved beyond a reasonable doubt to have been committed durin

1  
2 experience, what they saw, heard directly relating to  
3 whatever facts may be in controversy in the particular  
4 case.

5 There are lots of exceptions to that, but the  
6 one exception I want to talk to you about here is the  
7 exception for the so-called expert witness.

8 Witnesses who have become or who claim they  
9 have become expert in some art, science or profession or  
10 calling, expert by virtue of education or experience or  
11 both, may be presented by a party as expert witnesses and  
12 may state their opinions as to matters involved in the  
13 case along with the reasons for their opinions, and of  
14 course, they may be cross-examined on all of that.

15 You have heard, I think, subject to your recollec-  
16 tion, six people in this case who testified partly or  
17 wholly in the role of experts.

18 You heard two United States chemists, Mr. Roger  
19 Fuelster, and Mr. Robert A. Henderson, Dr. S. C. Chen, an  
20 associate professor of pathology at the Medical College  
21 of Ohio, Mr. Luciano V. Caputo, an examiner of questioned  
22 documents, Mr. Samir Sulayman, a registered medical tech-  
23 nologist, and Dr. Jerome Allen Levin, assistant professor  
24 of pharmacology at the Medical College of Ohio.  
25

1 jkb-10  
2  
3 These people, in one aspect or another, have  
4 placed their opinions about one thing or another before you.  
5 It is for you, the jury, to give to those opinions such  
6 weight as you think they deserve.

7 On the subjects respecting which they testified,  
8 as on all others, the ultimate decision on the facts is  
9 for you.

10 If you decide that the asserted opinion of an  
11 expert is not based upon sufficient education or experience,  
12 or if you conclude that the reasons for the opinion are  
13 not sound or persuasive, or if you find the opinion out-  
14 weighed by other evidence, you may reject it entirely, or you  
15 may give it such weight and significance in the whole case  
16 as you think it deserves.

17 Here and throughout, while you must consider  
18 all the evidence and weigh it and place it in its setting,  
19 remember that the ultimate issues are those that I have  
20 given to you, and not ultimately your choice as between experts  
21 on issues which may not in the end be ultimate or decisive  
22 for the case.

23 All of that is for you, and where the expert  
24 testimony fits, what you may infer from it as I say are  
25 matters for your sovereign, final, and exclusive judgment.

2 Now, including the experts, you have been re-  
3 minded that you have heard a total of something approaching  
4 50 witnesses. You have also heard some argument about the  
5 significance or possible significance of people who might  
6 arguably have been called as witnesses but did not appear  
7 actually to testify before you.

8 The significance of this is for you to judge.  
9 You may conclude in your judgment that your primary and  
10 overriding task will be to analyze and appraise the testi-  
11 mony and other evidence that has actually been placed before  
12 you. On the other hand, as I say, it is for you to  
13 weigh, in your good judgment, the contentions you have  
14 heard and the significance of the contentions you have  
15 heard about people who did not appear as witnesses.

16 The law on this subject is very simple. There  
17 isn't any presumption against any party in a lawsuit  
18 from the failure of that party to call a witness, if you,  
19 the jury, should find that the testimony that witness might  
20 arguably have given would be merely cumulative or repetitive,  
21 and would not be of greater value than that of witnesses  
22 who did appear and did testify.

23 On the other hand, if you find that it was  
24 peculiarly within the power of either the prosecution or  
25



1 the defense to produce a witness who could have given mater-  
2 ial testimony on some issue, the failure to call that witness  
3 may give rise to an inference, if the jury finds it warranted,  
4 that his testimony would have been unfavorable to that  
5 party.  
6

7 You will bear in mind throughout, of course,  
8 as I told you earlier, that the law never imposes on a defend-  
9 ant in a criminal case the burden or duty of calling any  
10 witness or producing any evidence.

11 In this same connection, you are reminded that  
12 in our system of criminal procedure both sides have the  
13 right to interview witnesses before and even during the  
14 trial. Both sides have the right to request or demand  
15 that witnesses appear in court and to seek an order of the  
16 Court in the form of what we call a subpoena, to compel  
17 a witness so to appear and testify.

18 Have these things that I just mentioned in mind  
19 in considering what significance, if any, to give to the  
20 failure of anybody to call any person about whom you have  
21 heard in the course of argument in this case.

22 Now I come to what in a sense is always the crux  
23 of the matter for the jury and any trier of fact in deciding  
24 contested issues of fact, the subject of credibility.  
25

1 jkb-13 3957  
2 I am sure you will realize, whether I had in-  
3 structed you about it or not, that you have to make a  
4 judgment about credibility in deciding with respect to each  
5 witness to what extent you may rely upon him or her for an  
6 account of the facts you are seeking to discover.

7 So it is a critical task. But it is not  
8 especially technical, and it is not legalistic. Lawyers  
9 and Judges do not, by training or otherwise, have any  
10 special expertise or competence in deciding questions of  
11 credibility. The instructions we give you on such a subject  
12 are more in the nature of reminders than novel information.

13 You are all mature citizens. You all have  
14 experience of the way the world works and the way people  
15 behave. Our system contemplates and anticipates that people  
16 like you come to the courthouse bringing with you the  
17 collective benefit of your wisdom and of your experience in  
18 deciding these key questions of credibility.

19 And so, as you counsel together, you will  
20 undoubtedly be considering and appraising the witnesses you  
21 have heard.

22 Did the witness, any one or other, appear to be  
23 truthful, candid, frank and forthright? Or did he seem  
24 evasive or shifty or otherwise suspect?

25 Did he appear to know what he was talking about?

1  
2 And perhaps more importantly, did he or she  
3 appear to intend to give you faithfully what he knew or  
4 remembered about the events in question?

5 Was the witness consistent or self-contradictory?

6 How did the direct examination compare to the  
7 cross? What motive if any did any particular witness  
8 have to lie?

9 You have heard argument about this, and I will  
10 refer to it specifically in a minute.

11 But you will consider with any witness the  
12 question of his interest or possible interest in the case  
13 and how this may have affected his testimony.

14 A witness may want to help a friend. A witness  
15 may be a law-enforcement person wanting to vindicate his  
16 position. Other motives of all kinds that you know about  
17 and can think about may conceivably generate an interest  
18 that might affect the testimony you have been given.

19 Now, obviously the fact that a witness is  
20 interested does not mean that we should disregard his testi-  
21 mony. If that were so, we would handle the matter very  
22 simply by never allowing a witness, who is interested, to  
23 appear, and then we commonly could not get facts about  
24 issues in litigation.  
25

1  
2 I mention interest, of course, not because  
3 it disqualifies, but simply, as I say, as a reminder of  
4 a factor you want to take into account.

5 A witness may be discredited or impeached, as  
6 lawyers say, by showing that at some time in the past he  
7 has made statements inconsistent with things he said here  
8 on the witness stand.

9 A witness may be discredited or impeached by  
10 showing that he has been convicted of a felony, that is, a  
11 crime punishable by a term of years in prison.

12 Again, prior conviction or prior inconsistent  
13 statements do not make a witness incompetent to testify.  
14 They are circumstances for you to take into account and  
15 weigh in appraising credibility.

16 As I have said, among the circumstances will  
17 certainly be the demeanor of the witnesses. And along with  
18 these other factors I have mentioned, let me say simply  
19 that these are illustrative only. Other things will occur  
20 to you, and you will reason together about what your exper-  
21 ience tells you in deciding how far you may rely upon any  
22 of the witnesses you have heard.

23 If you conclude that any particular item or  
24 portion of the testimony you have heard was inaccurate  
25 or untruthful, you want to consider whether this was the

1  
2 result of mistake or deliberate falsehood. You want to  
3 consider the nature of any inaccuracy that you find, and  
4 consider its size and moment or triviality or lack of  
5 moment in the setting of the case taken as a whole.

6 You want to consider if any witness has been guilty  
7 of inaccuracy, how far if at all you may rely on other  
8 parts of his testimony.

9 If you believe that any witness has testified  
10 wilfully falsely to any material fact it is within your  
11 prerogatives to disregard all his testimony, or you may  
12 credit the portions that you believe should be credited in  
13 reaching a fair account and determination of the facts  
14 in question.

15 Remember, as I think we considered when you  
16 were being selected to sit here, that no witness is en-  
17 titled in advance to any more or less credit based on his  
18 position or his status or which party called him. The  
19 mere fact that a party may have been called by the Govern-  
20 ment, that is a witness may have been called by the Govern-  
21 ment, does not entitle that witness to more credit in ad-  
22 vance of your appraisal of him than you should give to  
23 any other witness. Nor does it mean that you should credit  
24 him less in advance.

25 What I am saying is each one needs to stand

1           jkb-17  
2           on his own feet and be appraised as an individual under  
3           the general principle of equality that we try to follow  
4           in the courthouse.

5                   I come to a particular aspect of the subject  
6           of credibility which has been much discussed in summations  
7           and which undoubtedly will be among the things you will  
8           consider in the jury room.

9                   You have heard testimony in this case from  
10          witnesses who are variously described as informants and  
11          accomplices, people who have supplied the Government with  
12          information or cooperated, as the expression is used, and  
13          in several instances were themselves involved in criminal  
14          conduct of the kind you are about to consider in this  
15          case.

16                   I don't think it is necessary to remind you,  
17          but I do, that these terms, informant or accomplice,  
18          describe the witnesses Joaquin or John Ramos, Rocco Sassone,  
19          Earl Simms, and Joseph Conforti.

20                   You will recall that Simms and Conforti have  
21          pleaded guilty to offenses closely connected with the  
22          matters involved in this case.

23                   Ramos is serving a sentence from which he  
24          expects release in Ohio as a result of his cooperation,  
25

1  
2 though it also appears that he faces some uncertainty as  
3 to the question of parole revocation and possible imprison-  
4 ment for Federal parole violation.

5 You have heard that the families of Conforti  
6 and Ramos have been receiving support from the Government  
7 while these men serve as witnesses.

8 You know that Ramos has not been prosecuted  
9 for his part in matters involved in the trial before you.  
10 Sassone, whose role as an accomplice, if it was that,  
11 appears to have been relatively minor, has likewise not been  
12 prosecuted for any matters connected with this case.

13 And there are a few propositions to give to  
14 you generally about witnesses of this kind.

15 Your experience and your knowledge of how the  
16 world works make you aware that the Government frequently  
17 deems itself compelled to rely upon the testimony of informant  
18 or accomplices to the alleged crimes in question, and  
19 generally of persons who have criminal or otherwise unsavory  
20 records.  
21  
22  
23  
24  
25

1 The government takes the position and there is  
2 no dispute about this, that it must take the witness as it  
3 finds them and this has been thought to be particularly  
4 true in the prosecution of conspiracy cases.

5 It is claimed that the only people who are  
6 members or were members of the alleged conspiracy have  
7 evidence which is relevant and useful in the prosecution  
8 of the charge. There is no prohibition against the use of  
9 accomplice or informant testimony. Under the Federal Law  
10 which applies here, the testimony of an accomplice may be  
11 sufficient in itself, without corroboration, to authorize  
12 a conviction, if that testimony is found by the jury to  
13 meet the government's burden of proof beyond a reasonable  
14 doubt.

15 You must be instructed, however, and you are  
16 instructed, to scrutinize such testimony with particular  
17 care and to view it with particular caution in  
18 determining whether it is credible.

19 Among the factors that you will want to take  
20 into account in assessing credibility, is the evidence and  
21 the arguments you have heard as to what the motives of these  
22 witnesses were or might have been in giving testimony they  
23 placed before you. Was that testimony a fabrication in  
24 whole or in part, induced by benefits already conferred  
25



or expected?

Was the witness lying because of some promise or a belief that he may receive favorable consideration concerning his own difficulties with the law? Or did the witness as a matter of conscience or for other reasons take the stand and take the oath and tell you the truth in whole or in part?

Did he believe, in short, and I instruct you to ask this with respect to each of these witnesses, that he would best help himself in his trouble with the government and elsewhere by making false accusations or by telling truthfully damaging things that he knew firsthand?

With these witnesses as with all others, you will consider the specific questions I have invited you to consider, and all the circumstances surrounding them and their testimony, and make in that way your vital judgments as to credibility.

I am approaching the end of these instructions. Let me simply charge you briefly that when you go to the jury room your task, your sovereign task, is to decide guilt or innocence.

In deciding that I charge you not to be diverted by speculations concerning questions of punishment or possible punishment. Guilt or innocence is

2 your first and primary question. If anyone is convicted.  
3 the question of sentence, based upon other considerations  
4 is for the trial judge. So I will simply tell you not to be  
5 diverted by speculation on that subject.

6 When you go to deliberate, ladies and gentlemen,  
7 remember that there will be 12 of you and that the purpose  
8 of having 12 is the obvious one, of having you reason  
9 together. That means that each of you is entitled to have  
10 and express your own good judgment on the questions, the  
11 serious questions, entrusted to you.

12 At the same time it is expected, obviously, that  
13 you will exchange views with your fellow jurors. You will  
14 be prepared to listen attentively and where reason so  
15 dictates, and your conscience, to change an opinion you  
16 may have held which is shown to be erroneous. In the end,  
17 however, remember that the verdict, if and when you reach  
18 one, must represent the individual judgments and consciences  
19 of each member of the jury.

20 So you are not required to sacrifice or give up  
21 or forego a conscientious view simply because you are  
22 outnumbered at any given time. You must and you may give  
23 up your rational judgment if you are persuaded in reason  
24 and in conscience that you should change it.

25 While you are deliberating if you need to hear

again any of the testimony, send us a note through your foreman and we will find it with the help of our reporter and we will supply it to you as promptly as possible.

If you wish to see any of the exhibits, send a note about that, describe them the best way you can, and, again, we will undertake to supply that need.

If at any time while you are sending notes don't tell us how the division stands, don't tell us the vote. That is a private subject for the jury room and not a concern of ours.

Remember that there are five counts in this indictment, there are six defendants in count one, four defendants in each of counts 2, 3, 4 and 5. You will be asked through your foreman, if and when you have a verdict, to give it orally, separately with respect to each count and each defendant. We will ask your verdict under count 1 as to each of those names and similarly go on through counts 2, 3, 4 and 5.

Now, ladies and gentlemen, before I excuse our alternates, which I will do in a few minutes, I must consult briefly with counsel and that will be an occasion to give you what will be your last recess before you deliberate. Recess for a few minutes more or less while we talk together about whether there are any other or

further or different things that I ought to tell you.

(Jury left the courtroom.)

THE COURT: All right, exceptions.

MR. SLOTNICK: Yes, your Honor.

I would except to your Honor's refusal to take charge in number 1, 18, 14, 15, 17, 20 and 24 of my original requests to charge, together with numbers 4, 7, 8, 10, 14 and 20 of my supplemental requests.

I ask your Honor to charge the last paragraph of my original charge 24 in which I asked you to charge moral certainty with respect to reasonable doubt and also inconsistent conclusions in facts, so balanced that you can find either conclusion, you must find in favor of the defendant.

I would further ask your Honor to charge that with respect to Counts 2 and 3, that before they could convict they must find beyond a reasonable doubt that John Capra was a seller of narcotics to Harris and Morris.

Also, I object to your Honor's charge with respect to Counts 4 and 5 that Exhibits 86A through K were heroin or cocaine. The question is whether they

were heroin and cocaine in October 1971. Your Honor charged that they are presently and that is not the object of the indictment.

I object to your Honor's charge regarding the aiding and abetting and ask that the charge indicate that the defendant who substantially aids the conspiracy must have knowledge of an ongoing conspiracy and must do an act in furtherance thereof with said knowledge.

Also, I object to your Honor singling out John Capra in the conspiracy charge when you gave the example of Capra and Jermain.

I object to your Honor's charge of preponderance of evidence when he was charging that if they find by a preponderance of the evidence A, B and C were members of the conspiracy, that should be a reasonable doubt charge.

I object to your Honor's charge on the presumption of a continuing conspiracy and the further factual rule that membership must be proven by affirmative evidence.

I lastly object to your Honor's charge with respect that the government has to take its witnesses as it finds them.

That is not a rule but a contention of fact.

THE COURT: Well, I heard those which you whipped out rather speedily but I didn't hear any that I thought I ought to give so all of those exceptions are overruled.

MR. MC ALEVY: Your Honor, I just of course

1  
2 join with Mr. Slotnick and adopt his arguments concerning  
3 his objections.

4 Specifically, your Honor, with respect to the  
5 overt acts, your Honor read to the jury overt act No. 6 which  
6 concerns the January 17, 1972 transaction with Mr. Guarino  
7 and Louis Oliveras.

8 The Judge will recall on October 18 that particular  
9 charge was stricken, dismissed on Mr. Feffer's motion to  
10 your Honor and that is formerly Count 6. And now I find  
11 that the Court has now charged the overt act which has  
12 nothing to do with the case on October 18 and ask for a  
13 mistrial on behalf of Mr. Guarino.

14 THE COURT: You ask for a mistrial?

15 MR. MC ALEVY: Yes, I do.

16 THE COURT: Did you think to do that when I granted  
17 the government request to read the indictment, which you had,  
18 and nobody mentioned this. But I don't know how anybody  
19 can be hurt by mentioning an overt act which the government  
20 quite clearly failed to prove.

21 What is the government's view on that?

22 MR. FEFFER: Your Honor, two things.

23 First of all, the count severed was Count 6 which related  
24 to the Oliveras transaction.

25 Secondly, this indictment or a copy of the

indictment has been in the hands of defense counsel for some time now and it seems like an odd time to raise the question.

THE COURT: But without even thinking about overt Act No. 6 it seems perfectly clear to me that as a practical matter if the jury doesn't find any of the other seven, that the defendants are going to be acquitted because they do not find No. 6, I don't think. But if anybody wants the instruction they should disregard it, I will. Is that what you want?

MR. MC ALEVY: I asked for a mistrial.

THE COURT: I know you did. I am denying that. Do you want me to tell them to disregard it?

MR. MC ALEVY: Yes, your Honor. I would ask that you request the jury to disregard and strike it from the record because I felt it does prejudice my man unreasonably.

THE COURT: Any objection?

MR. FEPPER: I don't think, your Honor, -- is your Honor just telling them to disregard it?

THE COURT: That is all I am planning to do.

Anything else, Mr. McAlevy?

MR. MC ALEVY: That is all, your Honor.

THE COURT: Mr. Feitell?

MR. FEITELL: I join in all of Mr. Slotnick's

applications except with respect to, and those that  
 relate to refusal on the part of your Honor to grant certain  
 charges as well as his comments respecting your charge with  
 the single exception of his request under the Ganey rule  
 beyond a reasonable doubt.

Independent evidence, such as to connect the defend-  
 ant to the commission of the conspiracy or to identify him  
 as a member of the conspiracy, if we have again the  
 reasonable doubt, I would like to have it, but I do adopt  
 his comments on this at the moment.

I take more specific exception to your Honor's  
 comments that if you make a mistake regarding the law and  
 it is on the record, it can be corrected.

I think that injects into the jury thinking  
 something that is not appropriate.

With respect to counts 4 and 5, your Honor, in  
 discussing that feature of the case, which we took up before  
 and that is aiding and abetting, you failed to indicate  
 specifically to the jury that under counts 4 and 5, you  
 were to charge as to each defendant it would have to  
 apply to each defendant. I don't think the charge is  
 clear in that respect because what your Honor did was simply  
 to recite the names of the defendants within the context  
 of possession without saying that possession had to be fixed



upon each of them independently. I am not saying that you Honor didn't elsewhere define that, what possession constituted, but I don't think that later analysis covers my specific criticism.

Now, I also respectfully take issue with the Court's definition or failure to define what constitutes independent evidence sufficient to connect a defendant to the conspiracy.

You told the jury what they couldn't consider, told them that the defendant is not a member of the conspiracy, you can't consider the acts and declarations of other persons against him. But you never did tell the jury what constitutes independent evidence connecting a specific defendant to the conspiracy such as to make him a member of it.

That is all I have.

THE COURT: All right. I understand your exceptions. Let me ask the government counsel whether they are prepared to cross out Overt Act No. 6 and tell the jury it has been crossed out physically. Is that agreeable as a way to disregard it?

MR. SLOINICK: Your Honor, I object to that because that could only put in the jury's mind that the ones had been proven and that the others are for their

deliberation.

THE COURT: You didn't disagree when I said in response to Mr. McAlevy I would tell them to disregard it.

MR. SLOTNICK: You can tell them.

THE COURT: But not to strike it.

MR. SLOTNICK: I object to striking it but would cut it out.

THE COURT: Well, I will just tell them.

Mr. Levenson?

MR. LEVENSON: I except to your failure to charge or as a matter of fact even to rule on my request No. 2 which I submitted some four days ago, that is with respect to the pleas of accomplices. I request that you charge that evidence has been adduced Earl Simms pled guilty to one of the charges of which the defendants stand accused and that they are not to consider that fact as probative of either guilt or innocence of any one of the defendants.

THE COURT: Do the other defendants want me to charge that?

MR. SLOTNICK: Yes, I would.

THE COURT: All right.

MR. LEVENSON: I join in the exceptions of Mr. Slotnick.

THE COURT: Mr. Blackstone?

MR. BLACKSTONE: I except to the single conspiracy charge, your Honor for the reason that I have argued before in this case in dealing with the handling of the proposed charge a few days ago.

THE COURT: Anything else?

MR. BLACKSTONE: I have argued and you disagreed with me.

THE COURT: All right. You want to preserve your record if you need to.

Mr. Stone?

MR. STONE: Your Honor, I would join in the exceptions of other counsel and will ask for an additional charge, that you charged that conspiracy under 4705(a), must name persons who allegedly should have been given the order form. Counts 2 and 3, which are the order form substantive counts specifically name the person who received the drugs.

My contention is that if you are highlighting that element of the substantive crime, where the person is named has been the receiver, then not having received the order form, the conspiracy also must allege the named persons received the drugs under that conspiracy and the fact there is no named person would present us with a

dilemma I don't think we anticipated when we had the two conspiracy charges.

I further except to your Honor's charge where you over-emphasized the accomplice testimony being a necessary ingredient in a conspiracy case. I think you unfairly highlighted the fact that this is a conspiracy case and allows the government to have accomplice testimony in a conspiracy case. I don't think that was a fair charge and I except to it.

THE COURT: All right. Does the government have any exceptions or additions?

MR. PEPPER: Just one question.

That is with respect to Mr. Levenson's proposed statement to the jury. Is this limited to Earl Simms and his plea?

THE COURT: That is all he asked me for. Do you want anything else in that connection, Mr. Levenson?

MR. LEVENSON: I believe Simms is the one who pled guilty to this particular --

MR. FELD: Actually he didn't plead guilty to it.

THE COURT: He didn't plead to this indictment.

MR. FELD: To a violation of the tax stamp statute.

MR. SLOTNICK: I object to this. I ask also to

include Joseph Conforti too. He pleaded guilty to a matter pertaining to this case.

THE COURT: You mean the narcotics violation relating to these events or some of the events in this case? Would that get it?

MR. FELD: Yes.

MR. FEFFER: Your Honor, I would object with respect to Conforti. He was charged in a separate indictment, a separate conspiracy.

THE COURT: But it arose out of some of the events here, didn't it?

MR. FEFFER: Yes, your Honor.

THE COURT: All right, I will give that.

Anything else, gentlemen?

Mr. Feffer and Mr. Feld?

MR. FELD: No, your Honor.

THE COURT: I would excuse the alternates and give a couple of supplemental instructions and have the jury retire.

(Jury present.)

THE COURT: Now, ladies and gentlemen, as you are all aware, the 12 jurors originally empaneled have survived and appear to be enjoying reasonable health. I am sure that the four of you who have served

1 so patiently and attentively know that your function  
2 is about to be discharged.

3  
4 I commonly go on for several hours at this  
5 point to excuse the alternate jurors but considering the  
6 hour and so on, I will suspend with that.

7 I will simply say, Mr. Battle, Miss Landolfi,  
8 Miss Lone and Miss Sanchez that your service was  
9 critical and appreciated and I express to you the  
10 gratitude of the Court and I understand Mr. Swanciger has  
11 your certificates of service and so you are now relieved  
12 with our thanks. Good evening.

13 (Alternate jurors excused.)

14 THE COURT: As to the members of the jury who will  
15 in a minute or two retire to deliberate, as a result of  
16 my conversations with counsel, I have two additional  
17 things to say to you.

18 Of course, since I talked at you for such a very  
19 long time, I just put these things into everything else  
20 I said and do not magnify it or otherwise treat them  
21 specially because they are added now.

22 First, I read to you eight overt acts. On the  
23 basis of advice of counsel, which I think is correct, I will  
24 now inform you that you should disregard the overt Act No. 6  
25 in the indictment. That means that before you may find

1  
2 requirement of proof of an overt act, which is the third  
3 essential element under the conspiracy charge, you must  
4 be satisfied that one of the other seven numbers, one  
5 through five or seven or eight, has been proved beyond  
6 a reasonable doubt. Disregard number six for this  
7 purpose.

8       The second thing I want to mention or remind  
9 you of, in the course of the trial I think you learned that  
10 Earl Simms and Joseph Conforti, both of whom were  
11 government witnesses, have in the recent past  
12 pled guilty to criminal charges arising out of events,  
13 some of which were involved in this case.

14       As to that, I simply tell you, reminding you  
15 of something I said many times, that guilt is personal  
16 and there is no guilt by association.

17       I tell you that their pleas of guilt are in  
18 themselves of no significance whatsoever with respect  
19 to the guilt or innocence of any of the six people whose  
20 cases are being placed before you tonight.

21       For your guidance, the plan is that you will  
22 begin your deliberations for the next hour and you stay  
23 together and we will have the marshal arrange to take you to  
24 dinner at 7 and come back and proceed further  
25

and we will keep you posted as the evening progresses and we assume that you will keep us posted.

Now, if we may have the marshal sworn the jury may retire.

(Three marshals were sworn by the clerk.)

(The jury left to commence deliberations at 5:55pm)

MR. SLOTNICK: Upon consideration, I have no objection to striking that overt act. That was a little hasty on my part.

THE COURT: Yes, that is fine but I will not do it now because I thought I will tell the jury about it and that is why I consulted you and now let them remember it.

How many copies of the indictment do you have there?

MR. FELD: Four.

THE COURT: That is fine. Give them to the clerk to give to the marshal.

We are all to stand by and I will ask the marshals to let the clerk know when the jury leaves for dinner and then we will take our hour or so to be absent while they are absent.

It is my practice, which some of you know and some of you don't, when there are notes from the jury, to ask Mr. Swanciger to read them on the telephone. Normally



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while I am making my way down I ask him to read them to counsel. There are some rare exceptions that occasionally the jurors send out a note with a verdict and then I don't have it read until I get down.

But otherwise it will be read while I am coming down and you can formulate whatever advice you have on how I should handle it.

If any note is not read to you while I am on my way down, you may be assured that it will be read to you in due course and in time for you to take any appropriate action concerning it. Any problems?

MR. FEFFER: Your Honor, may we inquire through the marshals where the jury will be taken for dinner so as to avoid it.

THE COURT: Yes.

MR. STONE: May we give all the exhibits other than the narcotics so you won't have to look for it in case they ask for it?

THE COURT: Well, that is a good idea. Let me request that if a note comes just for exhibits and you are able to agree on it you agree and let them go in and inform the clerk and then we will put it on the record when I come down. If there are any disputes I will come down and handle them in that way.

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THE CLERK: They are going to Aldo's.

THE COURT: All right, let us not go to Aldo's  
then, gentlemen.

t9pm

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(Note received from the jury at 6:15

P.M.)

(Jury not present.)

THE COURT: All right, this note asks for eight more indictments. I take it that means copies of the indictment. We will send those in, yes?

MR. SLOTNICK: No objection.

THE COURT: The spelling on the note is not great.

It asks for Ramos' transcript. Let me skip that for a second.

And "Judge orders three elements of constitute conspiracy."

I guess they want me to read them the essential elements of the conspiracy count. Does anybody construe it differently?

MR. STONE: I think they only want the elements of the conspiracy, not the whole charge.

THE COURT: I say the elements, yes.

I will just read them the three elements. Is that agreed?

MR. LEVENSON: Yes.

THE COURT: Now as to the Ramos' transcript,

1  
2 how long is that, Mr. Reporter?

3 MR. LEVENSON: Six days, your Honor.

4 THE COURT: How many millions of pages?

5 MR. FEEFER: I will check, your Honor.

6 MR. LEVENSON: It is a thousand pages, your  
7 Honor.

8 About 840.

9  
10 THE COURT: Well, the answer to that request, it  
11 seems to me, subject to the opinions of counsel, runs like  
12 this: If they have deliberately concluded, after due con-  
13 sideration, that they want the 840 pages they will get them.

14 But I think they should be urged at this early  
15 stage in their deliberations to see if they can be satis-  
16 fied with something less. I suppose we ought to advise  
17 the jurors that we are not able to give them the transcript.  
18 They have the impression apparently that many jurors do that-  
19 they can just take the transcript and look through it.

20 I take it we are all agreed that they can't  
21 do that.

22 MR. SLOTNICK: I would not object to giving them  
23 the entire transcript.

24 THE COURT: Including the side bar conferences  
25 and so on?

MR. MC ALEVY: Without the side bar.

MR. SLOTNICK: If we work on it and delete the side bar, it would be quicker than having it read back to them.

MR. LEVENSON: That was my suggestion also.

MR. FELD: We will be here all night.

THE COURT: Well, I will tell you, my diet means skip lunch usually. Let me find out how many counsel are on a "skip dinner" schedule, because perhaps while the jury is out to dinner, those of you who follow that regimen could do that, and we could give it to them after dinner.

Is there anybody who is on that kind of a regime?

All right, well short of that, if counsel can get together in the next two hours and arrange for the necessary deletions or blockings out on one set of the Ramos testimony, that is agreeable with me.

Is it agreeable with everybody else?

MR. LEVENSON: Yes, your Honor.

THE COURT: All right, in that case, let me suggest that it ought to be possible to have that done by 9:30 or so.

MR. PEPPER: We are going to have a problem. For example, the transcript I have is marked up. I am sure

that counsel have probably marked up portions of their transcript. Also I think it will take a lot longer than two hours on what portions to delete.

THE COURT: Everything that is not in before the jury gets to be deleted.

MR. FRITELL: I object to the procedure, Judge, because I know of no way to guarantee myself that the jury will read whatever is given to them. Therefore, I think that they should be read the entire testimony. Then at least we have the certainty that they will get the cross and the direct. Otherwise they will get into involved discussion and skip around. I am against it.

MR. FEFFER: I don't see how 12 people are really going to be able to use one transcript. I think it is going to take a lot more time.

THE COURT: Okay. The objectors win. I won't do it if there is any objection. And there is objection, so we won't do it.

However, what I am going to tell the jury is to mull over it at least through dinner and see if they have a narrower request than that in light of the physical labor involved, which may be much more than they wish.

But if it turns out to be what they wish, on

jkb-5

3905

reconsideration, on a later note after dinner, as I say, I will give it to them. At this time I will give them the essential elements of conspiracy and eight more copies of the indictment, and that will bring us close to their dinner hour.

Any additioning or corrections to that program, gentlemen?

Okay, then let's have the jury.

MR. STONE: Your Honor, I think you should advise them there are 800-some pages and his testimony was approximately six days.

THE COURT: Yes, I am going to tell them.

We will mark this note Court Exhibit 6.

(Court Exhibit 6 marked for identification.)

(Jury present, 6:45 P.M.)

THE COURT: Mr. Edgehill, ladies and gentlemen, in response to your note, some parts are easier than other parts. You want eight more indictments it says. I take it it means you want eight more copies of the indictment. That is not sweat.

THE FOREMAN: Yes.

THE COURT: You asked for the Ramos transcript, and on that, let me say the following things:

First, it is 6:45 or thereabouts, and your

1  
2 schedule calls for you to go to dinner at 7:00.

3  
4 Second, Mr. Ramos was on the stand, I am reminded,  
5 for about six days. His testimony occupies some 840  
6 pages of the transcript.

7  
8 Third, you may have the impression that it is  
9 feasible to give you the transcript and let you take it to  
10 the jury room and read it. If it were feasible, that  
11 might be a solution, but it is not feasible. The transcript  
12 contains everything that happens, including side bar dis-  
13 cussions which, for obvious reasons, are not matters that you  
14 now wish to read, since we took pains not to have them  
15 within your hearing.

16  
17 Therefore, the only workable procedure for giving  
18 you the testimony of Ramos or any other witness, long, short  
19 or middling, is to have the reporter read it to you. 840  
20 pages, even delating the parts that are to be deleted, will  
21 be a very long read.

22  
23 Now you have just retired less than an hour  
24 ago, and I have this request and suggestion for you: I  
25 think it is desirable, when you have a need or a sense of  
a need of this kind, to see whether you can't focus it  
somewhat more narrowly than saying, give us all the testimony  
of so and so.



1  
2 I am not saying you can't do that. I am just  
3 saying that it would be desirable for you to make the  
4 effort, in the interests of efficiency and economy and  
5 survival.

6  
7 Then, if you have made the effort, and in the  
8 end it turns out that your need, and you are the judges of  
9 this, is for the full portion of the transcript you described  
10 in your initial note, we will proceed to fill it and have  
11 that read to you.

12 I am going to take only this much of a liberty  
13 with your request. I am not going to ask the reporter to  
14 proceed to satisfy it now, and I am going to table the notion,  
15 as it were. I am going to ask you to discuss this some more  
16 before and after dinner, and then we won't do anything about  
17 this till we get another note from you, or unless we get  
18 another note from you, and then if it is a note about this  
19 Ramos testimony, you are the bosses, quite accurately, and  
20 we will undertake to supply whatever you have determined you  
21 need.

22 Now, the third item in your note says, "Judge  
23 orders three elements of constitute conspiracy."

24 That is not a perfect lawyer's sentence, but  
25 you don't qualify for being lawyers. We -- I, and, I  
think, counsel have construed that to mean you wanted me to

1 repeat to you these three essential elements that comprise  
2 the conspiracy offense, is that true? Those are very  
3 brief, and I have, in each instance, stated the essential  
4 elements and then gone into some elaboration, the  
5 lengthiest elaboration being precisely in connection with  
6 this conspiracy count.  
7

8 Nevertheless, I am going to give you what you  
9 want, and I have seen your heads nodding, and not any  
10 more, and again, if after you have retired, and probably  
11 after you have had dinner, you conclude that you need more  
12 on this than I have given you, another note and we will  
13 comply with that.  
14

15 At this point, let me simply read to you again  
16 the three essential elements, all of which must be proved  
17 to make out the conspiracy charge.

18 First, that for some period between July 1, 1969  
19 and May of 1973, or some portion of that period, there  
20 was a conspiracy of the kind the Government alleges.

21 Second, that the defendants here on trial, or  
22 any one or more of them, knowingly and wilfully participated  
23 in that conspiracy.

24 That is the membership element.

25 Third, that someone of the conspirators committed

at least one of the overt acts alleged in Count 1 during the course of the conspiracy and for the purpose of furthering one or more of its objects.

Those, as I say, are the three essential elements.

And now, having given you such response as we have, and with the understanding that these eight additional copies of the indictment may go with you, let me request that you retire again, ladies and gentlemen.

(Jury retired to continue their deliberations at 6:50 P.M.)

THE COURT: Gentlemen, a couple of housekeeping things. First we were delayed somewhat by various things, including, I understand, people had to move their cars and so on, which is all understandable.

As a general matter, let us be clear that it is expected that all counsel and defendants, except when we are excused, and the Judge, will be available to respond promptly to notes from the jury.

Second, I am now informed there has been a revision in the dining plan. The jury is going to Giambone's on Mulberry Street, so Giambone's is the place for us not to go to.

Those are all the things I have, and I repeat, when they go out, you will be notified.

I have a message for Mr. Feitell, for whom I function as New York corresponding counsel, but I don't suppose we need that on the record, so if you will come up, I will give it to you.

MR. FEITELL: May I, Judge?

THE COURT: Yes, unless somebody else has anything at this time.

All right.

(Dinner, jury adjourned for dinner from 7:00 P.M. to 8:15 P.M.)

(Note from jury at 9:00 P.M.)

(Jury not present.)

THE COURT: Has the note been read to you, gentlemen? We will mark it Court Exhibit 7.

(Court Exhibit 7 was marked for identification.)

THE COURT: Does everyone understand what is meant by overt act Number 5 in this note?

MR. STONE: I would think it would be a reading of the overt act, your Honor.

THE COURT: They have got copies of the indictment.

1  
2  
3 It seems to me that it just relates to their  
4 interest in the facts that they think may be involved  
5 in that overt act, because the particulars that they then  
6 ask for are a hotel bill, Alan Morris and Willie Middlebrook  
7 motel bill, Lincoln Motor Inn, and then testimony of Sassone.

8  
9 MR. STONE: I think we could give them those  
10 exhibits which are connected with that overt act and let it  
11 go at that. I don't think they want a review of testi-  
12 mony as to who testified as to that overt act.

13  
14 THE COURT: No, I don't think so either. So  
15 we will give them the hotel bill. Have we got that?

16  
17 THE CLERK: Yes.

18  
19 THE COURT: Exhibit number what?

20  
21 THE CLERK: Number 44.

22  
23 THE COURT: And I guess that's it. Is that  
24 Lincoln Motor Inn?

25  
26 THE CLERK: Yes, sir.

27  
28 THE COURT: Have we got the testimony of Mr.  
29 Sassone?

30  
31 MR. FEFFER: Yes, we do. My only question would  
32 be whether they want his testimony with respect to that  
33 overt act or all his testimony? I think that might be  
34 a question you would want to address to them .  
35

MR. STONE: His whole testimony is less than 50 pages.

MR. SLOTNICK: It is short, your Honor.

MR. FEFFER: His testimony goes into much more detail than just that one act, your Honor.

THE COURT: Well, look, is his testimony related to the Lincoln Motor Inn episode --

MR. FELD: Yes, it is, in part.

THE COURT: I didn't finish the question.

MR. FELD: I am sorry.

THE COURT: Is that in an identifiable group of pages that you can all agree on?

MR. FEFFER: I think so, your Honor.

THE COURT: What are those pages?

MR. STONE: I don't know how we can agree. I haven't seen his proposal.

THE COURT: That is what I am asking about.

MR. STONE: I think it only affects Morris.

MR. FEFFER: It begins on Page 1384.

MR. SLOTNICK: Then we have to go into the cross that relates to that overt act. I think we would save a lot of time, your Honor, by reading these 10 or 12 extra pages, because it is not that long.

1  
2 THE COURT: Did somebody say it was 50 pages,  
3 is that correct?

4 MR. STONE: I just estimated it.

5 MR. FEFFER: His direct examination, your Honor,  
6 is on Pages 1384 to 1389 with respect to --

7 THE COURT: You mean concerning the Lincoln  
8 Motor Inn?

9 MR. FEFFER: That's correct.

10 THE COURT: And where is the cross?

11 MR. FEFFER: Then the cross-examination with  
12 respect to that incident begins on 1397.

13 THE COURT: Line what?

14 MR. FEFFER: On Line 11.

15 THE COURT: To what?

16 MR. FEFFER: It goes to Line 23 on that page.  
17 It is questions by Mr. Levenson.

18 THE COURT: And is that all you say on cross?

19 MR. FEFFER: I am checking to see if there is  
20 anything else on that.

21 (Pause.)

22 MR. FEFFER: It would just be that, your Honor.

23 THE COURT: Let's go back to direct. Would  
24 you give me the lines as well as the page numbers.  
25

1  
2 MR. SLOTNICK: Your Honor, that is the  
3 Government's representation. I'd like to look at it.

4 THE COURT: Don't you have a copy back there?

5 MR. SLOTNICK: I don't have a copy.

6 THE COURT: Isn't there a copy that I ordered  
7 for defendants?

8 MR. LEVENSON: It is the one copy I don't have  
9 here.

10 MR. FEFFER: It begins on Page 1384, Line 15 on  
11 the direct, and it goes through to Line 14 on Page 1389.

12 THE COURT: Let me ask you one other thing.

13 What are the pages, first and last, of all the  
14 Sassone testimony, direct and cross?

15 MR. FEFFER: The first page is 1373.

16 THE COURT: Through?

17 MR. FEFFER: 1403.

18 THE COURT: About 30 pages.

19 MR. FEFFER: And the only relevant cross, from  
20 what I can see, and, of course, counsel can look at this  
21 is on Page 1397.

22 THE COURT: You have given me that. Just give  
23 me what I ask you for.

24 I understand what you are saying, too, Mr.  
25 Slotnick, but I have a sort of view about this. I think



1 the jury ought to be given what it wants, not less, not  
2 more, and I am going to give them their choice. I just  
3 want to know what the situation is.  
4

5 Now, I am going to tell them they can have  
6 the whole business or that testimony, direct and cross,  
7 relating to the Lincoln Motor Inn episode, and they can  
8 indicate by nods, heads or smiles as to what they want.

9 You say you want to check on the Government's  
10 representation. Please check to see if they have given  
11 me the right pages.

12 MR. STONE: I have. I went over it.

13 MR. LEVENSON: I don't believe there is any side  
14 bar during it, during the Sassone testimony. I was wonder-  
15 ing if we could just take the pages out.

16 THE COURT: No, we are not going to do that.

17 (Pause.)

18 MR. SLOTNICK: Apparently the Government has  
19 chosen the correct pages with regard to the Lincoln Motor  
20 Inn.

21 However, your Honor, again, if you are going to  
22 ask them, I would also appreciate it if you would indicate  
23 that the entire testimony of Sassone was only 30 pages.

24 THE COURT: Okay. Let's get the jury in.

25 (Jury present at 9:20 P.M.)

1 jkb-16  
2 THE COURT: We have your note, ladies and  
3 gentlemen.

4 As we understand it, you wanted the exhib it  
5 which is the Lincoln Motor Inn hotel bill, and we will  
6 give you that.

7 Then there is a reference to the testimony of  
8 Sassone, and we are a little uncertain what you mean by  
9 that, because the top of this note says, "Overt act Number  
10 5."

11 And the accusation in the indictment, under  
12 that number, relates to the Lincoln Motor Inn episode,  
13 so we didn't know whether on the one hand you wanted the  
14 Sassone testimony that relates or may relate to that  
15 episode or all of the Sassone testimony, and before you  
16 answer, let me just tell you that we took some time to find  
17 it. All of his testimony covers some 30 pages. We have  
18 also agreed upon the pages that appear to relate to this  
19 Lincoln Motor Inn matter and I will ask you, Mr. Edgehill,  
20 Mr. Foreman, which is it that the jury wants, the whole of  
21 Sassone or the Lincoln Motor Inn?

22 THE FOREMAN: The Lincoln Motor Inn, his testimony  
23 as to who was where and what.

24 THE COURT: I will ask the reporter, then , to  
25 read the pages we have all agreed on, which in the direct

1  
2 examination is Page 1384, Line 15, to 1389, Line 14, and  
3 in the cross, 1397, Lines 11 to 23.

4 (Record read.)

5 THE COURT: All right, I think that gives you  
6 what you want.

7 THE FOREMAN: Your Honor, we have one more ques-  
8 tion that maybe we can save with the envelopes back and  
9 forth I was going to send out. They would like to know,  
10 the jurors, who was arrested with Simms in Detroit? It  
11 seemed to have slipped past us -- if it is possible to know  
12 it.

13 THE COURT: Well, let me say that, unless there  
14 is a stipulation, which I haven't asked for, or inquired  
15 about, that, strictly speaking is not the kind of question  
16 we can answer for you.

17 You have to get together and see what testimony  
18 you want, and who talked about that, and what you remember  
19 from that. And if you don't remember from the testimony,  
20 then you may have occasion to ask us to read it to you.

21 Again, I say, without searching my own memory,  
22 which I am absolutely not going to do, because I am not  
23 the trier of facts, you are, unless it happened to be some-  
24 thing that everybody was absolutely agreed on, I would not  
25

1 jkb-19  
2 MR. LEVENSON: Page 72 indicates that it was  
3 Simms and Eugene Brown.

4 THE COURT: Eugene Brown? Is it stipulated?

5 MR. STONE: Your Honor, there is another problem  
6 here. I don't know whether it was testified to or not.  
7 In fact, my recollection is that it didn't come up. But  
8 the fact remains that Morris was arrested with Simms, was  
9 jointly indicted with Simms in this particular case. I am  
10 talking about the Detroit search and seizure.

11 THE COURT: You mean he was arrested at the  
12 airport.

13 MR. STONE: He was arrested at the airport.

14 THE COURT: When you say another problem arises,  
15 you say you are not prepared to stipulate to Mr. Blackstone's  
16 answer?

17 MR. STONE: That is correct. And they may  
18 very well be thinking along those lines, the fact that  
19 Morris is from Detroit. Some of my cross --

20 THE COURT: I don't want to debate it. You  
21 don't want to stipulate an answer, is that what you say?

22 MR. STONE: Not right now, no.

23 THE COURT: Does anybody have any different view?  
24 I am not going to press you to stipulate any answer.  
25

1 jkb-18

2 give you the answer to an ultimate question like that. 3998

3 Do you understand what I mean?

4 Now, I am going to ask you to retire.

5 If I have any immediate further information for  
6 you on that, I will call you back, so we didn't save much  
7 time. If you don't hear from us in five or ten minutes,  
8 and you still have an inquiry in that area, I guess you will  
9 have to formulate it on a piece of paper, and let us look at  
10 it and then call you out again.

11 Okay?

12 (Jury retired at 9:30 P.M.)

13 THE COURT: All right, can I keep you, gentlemen?  
14 Can I have your attention for a minute? You heard the  
15 question put by the foreman, and you hear my non-answer.  
16

17 Is there any different thinking that anybody  
18 says should be given in response to that or are you content  
19 to wait for any further inquiry they may choose to make?

20 MR. BLACKSTONE: I would ask that the answer  
21 be furnished to the jury.

22 THE COURT: What do you say the answer is?

23 MR. BLACKSTONE: That is what we are checking now.  
24 I recall that it is a person not on trial here today that  
25 was arrested with Simms, who received the -- I am just going  
to have to --

1 jkb-20  
2 MR. LEVENSON: Your Honor, I would suggest  
3 that you ask them if they want to read the Johnson direct  
4 examination which contains the answer, if they don't want  
5 to stipulate. I think that is what they are really asking,  
6 Page 72 it sort of indicates who was arrested with him,  
7 and who was --

8 THE COURT: I am not going to ask them if they  
9 want to read the direct testimony. They didn't ask me  
10 anything about Johnson.

11 Look, I wish you all wouldn't converse while  
12 we are trying to get something straight.

13 MR. BLACKSTONE: Your Honor, I think, if I  
14 may, the Johnson direct testimony indicates very clearly  
15 that both Earl Simms and Eugene Brown were arrested, and  
16 there is a question on the bottom of Page 73:

17 "Q After they were placed under arrest, tell  
18 us what you did with the box and the people whom you  
19 arrested,"referring to Brown and Simms. And I think that  
20 that is very clear; it is testimony that was adduced, and  
21 it ought to be told to the jury, particularly since there  
22 are so many names, and I certainly don't want the jury  
23 possibly to think that it was Mr. Harris who was arrested  
24 then, when it was not.

25 And I think that is the kind of -- this is the

1  
2 kind of situation where there are so many defendants and  
3 so many names that were dropped that I think it is import-  
4 ant that the jury not have some idea that something occurred  
5 when we can clear it up very quickly, and it is quite clear  
6 from this testimony of Johnson that both Simms and Brown  
7 were arrested then, and it ought to be told to the jury.

8 THE COURT: Mr. Stone, what do you say to that?

9 MR. STONE: I think that Morris in fact was  
10 arrested.

11 THE COURT: Do you think the record shows that  
12 anywhere?

13 MR. BLACKSTONE: The record doesn't show it,  
14 Mr. Stone, so why are you raising those issues?

15 MR. STONE: I think it would be misleading to the  
16 jury, though, to answer that question in that manner. They  
17 infer that Morris is from Detroit, and I think they are  
18 interested in that particular situation.

19 THE COURT: What does the Government say about  
20 this?

21 MR. FELD: Well, there were two females that were  
22 also arrested with Simms and Brown, to make it an accurate  
23 picture, and their names are in the record. There is no  
24 testimony in the record as to Mr. Morris' arrest.

25 MR. BLACKSTONE: Your Honor, the jury is only

1 asking what the testimony shows, and the testimony shows  
2 that this one person Brown and the other person Simms was  
3 arrested. I have Mr. Stone here talking about a fact not  
4 before the jury, namely, that Mr. Morris was arrested, and  
5 why he refuses to stipulate is something that is totally  
6 beyond me. I don't comprehend the point he is trying to  
7 make here.  
8

9 As far as the point that Mr. Feld makes, that  
10 there were two other women arrested, which is reflected  
11 in the 3500 material, the fact remains that this was not,  
12 so far as I could see in this testimony of the agent, re-  
13 vealed to the jury.

14 Therefore, the jury could only be asking what  
15 the record shows, and the record shows those two individuals.  
16 And I am in a position of trying to defend my client and  
17 I don't want that jury to think it was Mr. Harris who was  
18 arrested then and there. And I don't see that there is any  
19 problem at all and I don't know why Mr. Stone presses it.

20 MR. STONE: Well, I appreciate Mr. Blackstone's  
21 dissent. I think that is healthy for the criminal justice  
22 system.

23 However, the evidence of a conspiracy here is  
24 linked by a photograph at Madison Square Garden, showing  
25 Mr. Simms and Mr. Morris. I think it is further linked



by two people on an airplane. Mr. Morris supposedly came back to Detroit on that same flight.

THE COURT: Was he arrested?

MR. STONE: He was in fact arrested.

THE COURT: Look, this is the reason, with all respect to how you would like things to come out, Mr. Blackstone, why the Court is not able, unless there is an absolute and happy stipulation, to give answers to questions like this.

Whether we like it or not, the foreman did not ask me one word about the testimony of Johnson. He just asked this ultimate question, and an ultimate question is one that a jury can answer by inference as well as by direct testimony. And it will not do simply to read to them the direct testimony that you find agreeable and tell them that is the whole story because it is arguable on this record, by some other defendant or the Government or somebody, that there is more to the story, and therefore I adhere to what I told Mr. Edgehill, we are not going to answer his question.

Now if and when they want to hear the testimony of Mr. Johnson or any other evidence that may help them get some answer to this question, we will, of course, give it to them.

1  
2 I give this note to the clerk as Court Exhibit  
3 Number 7.

4  
5 MR. SLOTNICK: May I make a suggestion in attempt  
6 ing to aid this situation?

7  
8 THE COURT: Yes.

9  
10 MR. SLOTNICK: Mr. Blackstone is concerned about  
11 the jury inferring that Mr. Harris was arrested. Appar-  
12 ently Mr. Stone is not concerned about the fact that the  
13 jury learned that Mr. Morris was arrested. We could  
14 alleviate both of those concerns by simply stipulating to  
15 the fact that Mr. Morris was arrested with Mr. Brown and  
16 Mr. Simms, and I would have nothing -- I would be very happy  
17 to stipulate to that.

18  
19 MR. FEITELL: We are opening up a door, Judge.  
20 I have an objection.

21  
22 THE COURT: Your objection is sustained. We  
23 are closing the door. We will wait for another note. It  
24 is a very interesting discussion, but it is over.

25  
All right, we will keep in touch, gentlemen.

(Note received from the jury at 9:55 p.m.)

(The following took place at 10:13 p.m.)

THE COURT: This note, which is the next Court Exhibit, No. 8, says "We would like to hear the testimony of John Kostecke concerning the surveillance of Harris and Simms at the Detroit Airport where they were arrested."

(Court Exhibit No. 8 marked.)

MR. BLACKSTONE: Your Honor, I don't mean to interrupt but I spoke to Mr. Feffer and he and I, I believe, have agreed to stipulate, if the Court would be agreeable, the fact that Mr. Harris was not arrested nor was he observed at the Detroit Airport on December 8. And this, of course, I can't help but go back to my original request, where I feared that possibly the jury might have been confused and thought Harris was there and that is exactly what they were thinking and it turns out now that we have to attend to that.

THE COURT: Well, you say you are prepared to stipulate Harris was not arrested or observed at the Detroit Airport on December 8?

MR. BLACKSTONE: Yes,

THE COURT: 1970. And further that Harris was not arrested with Simms at all?

MR. BLACKSTONE: That is correct.

THE COURT: Is that a fair statement?

MR. BLACKSTONE: Yes.

THE COURT: Who opposes that?

MR. FEFFER: Your Honor, not that he was arrested at all but on that date at the Detroit Airport, because the question is limited to what happened at the Detroit Airport.

THE COURT: No, he was not arrested with Simms at all.

MR. FEFFER: That is correct, your Honor.

THE COURT: That is all I want to say to them, at the Detroit Airport or any other place.

Well, all right, that sounds fair to me because it is accurate. Does anybody oppose it?

I am prepared to convey that information to the jury because their note now obviously embodies a misconception and then ask them if they still want the testimony of Officer Kostecke and if they do, have we got it and are we ready with it?

MR. BLACKSTONE: Yes.

THE COURT: Concerning the surveillance at the Detroit Airport.

Let us have the jury in and correct this because

their note is wrong in any event and that may end their problem.

(Jury returned to the courtroom at 10:16 p.m.)

THE COURT: Now, we have your last note, ladies and gentlemen, which to remind you says "We would like to hear the testimony of John Kostecke concerning the surveillance of Harris and Simms at the Detroit Airport where they were arrested."

This note we are all agreed appears to embody a misconception and that is why we called you out, to try to clear that up.

It is agreed that Harris was not observed or arrested at the Detroit Airport on December 8, 1970 when Simms was arrested. Harris was not arrested with Simms at all.

That is as much as I am going to tell you to clear up, as I say, the apparent misconception in your note and then, having done that, on agreement of all counsel, I want to ask you do you still want John Kostecke's testimony or do you want to go back in the light of this intelligence and proceed some more?

All right, let me tell you the situation. I don't need to tell you it is 10:20 because you know that but perhaps I should tell you that the plan is to have a bus or

buses here at 10:45 to take you to the place where you will be lodged for the night in a mid-town hotel.

So let me ask that you retire again and you can more or less count on the schedule I just gave you.

(Jury left the courtroom at 10:20 p.m.)

THE COURT: If I haven't heard anything by then I will be down at 10:45 and unless there is some different view, I plan to have the jury back here at 9:30 in the morning, at which time they will go right to the jury room and we will all be notified when they have resumed their deliberations.

Is that agreeable with everybody?

MR. STONE: You have no intention of asking if they have reached a partial verdict on any defendant on any count?

THE COURT: Tonight? I had no intention to do that.

Do you desire that I do it?

MR. MC ALEVY: No, sir.

MR. STONE: Everybody voted me down unanimously.

THE COURT: I will meet you at least half way, Mr. Stone. I will tell them as a sort of parting thought that if any time in the course of the day they have reached a partial verdict and wish to report it they may but

1 rsg 5

4009

2 I won't ask them for one tonight.

3 MR. STONE: All right. My client moves for a  
4 mistrial and that is it.

5 THE COURT: I will reserve decision on that.

6 tllpm

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(Jury note received at 10:45 o'clock p.m.)

(Jury not present.)

THE COURT: It says here on this next note, which is Court Exhibit 9 --

(Court's Exhibit 9 marked for identification.)

THE COURT: -- "Testimony of surveillance of Harris and Jermain at Villabianca Restaurant. (Nauwens, Jackson, Canavan?)"

Have you all looked? Are you agreed on what that refers to?

MR. BLACKSTONE: Your Honor, we just got the note moments before you came here. I think that it was Nauwens, Canavan and the other agent, Jackson, who made the observation.

What is unclear to me is whether they are asking in general for the observations of the November 5th, particularly with regard to the restaurant, or whether they are asking for the entire surveillance extending into the 5th and the 6th.

THE COURT: The note this time is quite clear, "At Villabianca Restaurant."

MR. LEVENSON: It starts on page 1036, your Honor.

THE COURT: Listen, I'll tell you what I'd like to do because it is approaching 11; the buses are here;



1  
2 we are not going to read it now, in any event.

3 I would like to ask you to convene at 9 a.m.  
4 with your respective views of what portions of the record  
5 are covered by this note, preferably to agree.

6 If you cannot agree or, whether you can or not,  
7 we will get together at 9:20 and resolve the questions,  
8 if there are any.

9 I am told that it is difficult, as a matter of  
10 logistics, to get the jurors here and ready before 9:30,  
11 so we will follow that schedule.

12 Everybody is to be in at 9, confer on this. I  
13 will be in chambers by 9. If I have not heard anything,  
14 I will be down by 9:30 to make sure that you are all in  
15 agreement or to see if I can help you resolve disagreements.

16 All straight?

17 Okay, let's have the jury in.

18 We will let them go for the day.

19 (Jury present.)

20 THE COURT: Now, we do have your note, ladies  
21 and gentlemen, and the fact is, too, that the transportation  
22 is here to take you to your hotel.

23 It has been a long day, and it seems to all of us,  
24 and I suspect to you, that maybe we ought to suspend for  
25 the day.

What we will do is get here somewhat ahead of you in the morning, and undertake to find and agree upon the portions of the transcript that answer to your note, and have them ready to be read to you at or about 9:30 a.m., at which time I will ask the marshals to see that you are all breakfasted and here.

For your guidance tomorrow, let me say that if at any time in your deliberations you arrive at a partial verdict, a verdict any way on any one of the counts with respect to any defendants, and you wish to report that partial verdict, you may do so. We will leave that to your judgment.

For now, let me end this day's work for you and wish you as pleasant an evening as is possible under the circumstances.

We will see you in the morning.

(Jury left the courtroom at 10:55 p.m.)

THE COURT: All right, good night, gentlemen.

(Adjournment taken to 9:00 a.m., November 20, 1973.)

12pm

UNITED STATES OF AMERICA,

vs.

73 Cr. 450

JOHN CAPRA, et al.,

Defendants.

New York, New York  
November 20, 1973 - 9:20 a.m.

(Jury resumed deliberations.)

(Open court; jury not present.)

THE COURT: I understand there has been agreement on the portions of the transcript that are responsive to the jury's last note; is that correct?

MR. FEFFER: That's correct, your Honor.

MR. BLACKSTONE: Yes.

MR. FEFFER: I have given the pages to be read to the reporter. I believe that Mr. Blackstone and myself, Mr. Levenson, are in full agreement, and Mr. Feitell.

THE COURT: All right. Then suppose we have the jury in and proceed to read it to them.

Is it Nauwens, Jackson and Canavan?

MR. FEFFER: That's correct.

THE COURT: And we will read it in that order, since that is the order in the note.

MR. FEFFER: That's correct.

(Jury present.)

THE COURT: Good morning, ladies and gentlemen. You all look well and rested. I trust you are. Counsel have located, with the reporter, the testimony you asked for in your note of last night, and I think we are ready to have it read to you now.

(Record read.)

THE COURT: All right, ladies and gentlemen, I think that gives you what you asked for.

Why don't you retire now, please.

(Jury retired at 9:45 a.m.)

(Note received from jury at 10:25 a.m.)

(Open court; jury not present.)

THE COURT: You have all had read to you, I assume, the latest note from the jury, which will be Court Exhibit No. 10.

(Court's Exhibit 10 marked for identification.)

THE COURT: Which says, "When we are considering overt acts are we to deal only with specific evidence for the specific act?"

I take it the answer to that is that with respect to any issue of fact, any evidence that has been allowed into this record, and that the jury finds probative one way or the other, may be considered.

I don't know of anything else to tell them on that.

MR. SLOTNICK: Your Honor, I would like the answer to it to be a very simple one-word "yes."

THE COURT: Would you like that?

MR. SLOTNICK: Yes, I would.

THE COURT: All right, I won't give that.

MR. STONE: I would join in that.

MR. MC ALEVY: I would join in that also.

MR. SLOTNICK: May I give my reason? An indictment has been framed and there are certain overt acts that we have been greeted with, and as a result of that we prepared our case a certain way, and the fact of the matter is very simply that the jury has to judge from those overt acts, from the specific evidence tied into them, as to whether there is a conspiracy or not.

Your Honor so charged them.

THE COURT: Anybody else want to be heard?

I will only say that unlike Mr. Slotnick and other counsel I don't know exactly what "specific evidence" means, but, in any event, let's get the jury in.

MR. SLOTNICK: Perhaps your Honor could ask what they mean by that?

THE COURT: No, no.

MR. FEITELL: Your Honor, doesn't the answer to that question depend upon whether or not the jury has

arrived at the point as to whether or not they have concluded that a conspiracy exists as among certain people, because the acts and statements of certain --

THE COURT: No, the answer is no. It doesn't depend on that. The note doesn't say that, and I don't know what order the jury is proceeding in.

I am going to simply answer its question and not embark on jury deliberations with the jury.

(Jury present at 10:25 o'clock a.m.)

THE COURT: Now, ladies and gentlemen, we have your note which asks whether you are supposed to deal only with specific evidence for the specific act in your consideration of the overt acts.

I will simply tell you, in response to your inquiry, that the term "specific evidence" doesn't have any special meaning, and I am not going to try to guess at what meaning you think it may have.

I will simply instruct you that with respect to any factual issue in this case, the record of evidence has been placed before you and you are to consider that record in determining what things have been proved or not proved or disproved, and all evidence which in your collective judgment you find germane to these issues is before you for your consideration on the questions you are to

2  
3 decide.

4 That is the best I could tell you in answer to  
5 that note.

6 If you have some other question at some other  
7 point, as usual, we will answer that, but now please  
8 retire.

9 (Jury retired at 10:30 o'clock a.m.)

10 MR. FEITELL: Your Honor, I'd like an  
11 objection to that, to the extent that it omits any  
12 geaney formulation in this Circuit.

13 MR. SLOTNICK: May I join for the purpose of the  
14 record and except to your Honor's charge, and ask that he  
15 should have charged the geaney and the reasonable doubt  
16 proposition combined with what you said, and also  
17 incorporate my prior remarks.

18 MR. STONE: I object, your Honor. I think a  
19 simple "yes" would have been sufficient.

20 MR. MC ALEVY: I join with all the objections  
21 of my brother counsel, your Honor, and exceptions.

22 MR. BLACKSTONE: I also join with all the other  
23 objections.

24 MR. LEVENSON: I also join.

25 THE COURT: All right, gentlemen, let's keep  
in touch.

(A note was received from the jury at 11:30 a.m.)

THE CLERK: The note reads: "All transcripts of phone taps on Diane's Bar." Is there any objection or do you want the Judge to come down.

MR. SLOTNICK: I would like to have the Judge down.

THE COURT: This note, Court Exhibit No. 11 says: "All transcripts of phone taps on Diane's Bar." (Court Exhibit 11 marked.)

THE COURT: I understand there is some disagreement about what ought to be given in response to this?

MR. SLOTNICK: Yes, on behalf of the defendants and I think the government will stipulate to this, your Honor, we agree that they should be given the tape recordings because --

THE COURT: It says transcripts.

MR. SLOTNICK: The tape recordings can be construed as transcriptions.

THE COURT: I will ask them.

MR. SLOTNICK: Secondly, the transcripts, if they so desire, were only submitted as an aid memoir for the purpose of their listening to the tape recordings and being able to follow.

There are certain inaudible portions in which

xxx



your Honor as I remember advised him of the fact that they are to make the determination what was in the portion and, thirdly, there has been a rather substantial issue with respect to summation that certain portions of that transcript which are not transcribed and as a result of that I felt that in all fairness they should be allowed to look at the written transcripts and listen to the oral transcription.

THE COURT: I understand that. As I recall, though I may recall incorrectly, when the parties finally came to grips with those transcripts, we focused on whether there was any disagreements as to the correspondence between the transcripts and the tapes and that penultimate there was one disagreement and then by the deletion of a passage, again if my recollection serves correctly, that one disagreement was eliminated and there were none.

MR. SLOTNICK: That is correct and your Honor indicated to the jury that what is marked inaudible is for their judgment. Now, the passage or the thing that I am referring to in my summation I referred to "Hello, FBI." And that is not transcribed in the transcript and there is a notation with reference to inaudible. Mr. Feffer could identify it.

THE COURT: Are you now saying that it is your

contention, never made before of an inaudible part that Mr. Capra should have been heard to be saying "Hello, FBI?"

MR. SLOTNICK: It is my recollection Dellacava said it.

THE COURT: You are saying this was before me at one point in these proceedings?

MR. SLOTNICK: Your Honor allowed the jury to interpret --

THE COURT: Did you raise that with me before as a contention as to that passage, what it may be?

MR. SLOTNICK: There was no necessity for me to do same. Your Honor allowed them to decide as an issue of fact whether what was on the transcript was what was in the recording.

THE COURT: Now you are saying that if they listen carefully they will hear that?

MR. SLOTNICK: As they heard it originally, that is correct.

THE COURT: If they want to listen, I will let them.

Is there anything else to be said about this?

MR. FEFFER: Your Honor, for the record, the government does not stipulate to permit the jury to listen

to the tapes unless they want to listen to the tapes.  
The note is very clear.

THE COURT: I understand. I am going to give them their choice. Let us bring the jury in.

MR. PEPPER: Another thing, I had asked Mr. Feitell whether he would consent to having 12 copies go in and he said no.

MR. FEITELL: I said that the exhibits themselves were the only thing that the jury is entitled to see and that copies of exhibits are not authorized to the jury. That is all I said. For this reason I felt constrained--

THE COURT: There is no question that the copies they have before them are identical reproductions of the exhibits?

MR. FEITELL: I don't know if there is a question now as to that.

THE COURT: We will resolve that. We have identical ones and if they want them --

MR. PEPPER: They are the same ones passed earlier.

(Jury returned to the courtroom at 12 p.m.).

THE COURT: Now, ladies and gentlemen, on your note it asks for "all transcripts of phone taps on Diane's Bar."

We called you out for one reason, I want to remind you that those transcriptions are meant to be reproductions in writing of what appears to be audible on the tapes. I told you that as far as the passages were thought to be audible and inaudible, as far as the parties were concerned, it was thought that the transcripts were an adequate account or at least there were no disputes about the accounts given by the transcripts.

Nevertheless, the primary evidence in question was the tapes. Now, I remind you of that because I also said to you that in your capacity as the Judges of the facts, even agreement of counsel as to those passages that seemed to be inaudible would not be binding on you and if you heard something on the tape that was meaningful to you and made any difference, it was for you to judge what meaning and what difference it might have.

All that is by way of recalling to you the context in which your request is now made and by way of putting to you this question: Do you wish to have just the transcripts or do you wish, in addition, or at the same time, to hear the tapes as well? Mr. Foreman, are you able to answer that question?

THE FOREMAN: Just the transcripts. We want to read them.

2 THE COURT: Just the transcripts, all right, now,  
3 I will let you take them with the understanding that I  
4 have expressed and we will give you -- let me delay about  
5 three minutes while we determine whether we have exact  
6 copies available so that you may have more than one for  
7 convenience.

8 As soon as we have determined that, we will  
9 send you either one set or a number of sets, which I think  
10 you would find preferable for your study.

11 Why don't you retire and we will take  
12 care of that promptly.

13 (The jury left the courtroom at 12:03 p.m.)

14 THE COURT: Now, where are these copies.

15 MR. PEPPER: On the cart, your Honor.

16 THE COURT: Any defense counsel want to check it  
17 now? My recollection is they are Xeroxes but that is an  
18 improper word. But let us check and see if it is agreed  
19 they are exact and if they are, we will send in as many  
20 as are available.

21 MR. SLOTNICK: I most respectfully except.

22 MR. FEITELL: On the government's representation  
23 that the others are not marked, those copies will be  
24 satisfactory, but I still adhere to my previous objection  
25 and join in Mr. Slotnick's.

THE COURT: All right.

MR. MC ALEVY: I also join in that. The best evidence would be the tape recordings themselves.

THE COURT: I seem to recall that Mr. Slotnick explicitly invited the jury to ask for these. Is that recollection correct, Mr. Slotnick? You showed them to the jury and invited them to call for these transcripts.

MR. SLOTHICK: What I meant was listen to the tape recordings.

THE COURT: Whether or not you meant it, but isn't that what you said?

MR. SLOTHICK: I don't know what I said. I may have.

MR. FEITELL: I didn't understand him to mean that and I want it clear on the record that these are solely aids memoir and that they are an adjunct to the physical evidence itself or explanative of it and I don't think that they should be given to the jury in substitute for the evidence as such.

MR. MC ALEVY: That was my understanding when I had no objection to those being marked in evidence.

THE COURT: All right, send them in. Unless there is objection I will send word through the marshal that the jurors are requested not to mark up any of these

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copies, is that all right with everybody?

MR. SLOTHICK: If they are getting copies it may be efficacious for them to mark them up for whatever reason they want to.

THE COURT: All right, I won't send in any instruction. Why don't you just send them in.

MR. PEPPER: We will send in the copies and they will not mark up the originals.

(Exhibits 75A through 75S sent to jury.)

t2

(The following took place at 3:15 p.m.)

THE COURT: The latest note, Court Exhibit 12, calls for certain exhibits and I understand there is no dispute about that.

And it says, "Detective Eaton's testimony on wiretap."

(Jury note marked Court Exhibit 12.)

THE COURT: I understand there is some disagreement about that. Is that the situation?

MR. FEITELL: Yes, there is a disagreement. I think the point of disagreement is whether or not in re-reading Detective Eaton's testimony on the wiretap we should restrict ourselves to what the jury asked for, namely, the wiretap testimony, or are we going to get into testimony relating to surveillance which arguably grows out of the overhears.

Because they are intermingled in the testimony, but the record is capable of dissection so that all you do is get testimony relating to wiretaps, that is, the identification of the voices, the playing of the telephone conversations and the officer's interpretation of what the parties were talking about or who said this and who would bring a hogie sandwich, et cetera call after call.



I don't think that the jury's question calls in any way for a presentation of the inter-relationship between the overheard and the surveillance and that is the nub of the issue.

THE COURT: You are saying it should be confined strictly to testimony relating to what was overheard?

MR. FEITELL: Yes.

THE COURT: The government position is different?

MR. FEITELL: There is more to this, Judge.

There is also some testimony relating to wiretaps which came out on cross which quite arguably is within what the jury is requesting and doesn't have to do with surveillance. It has to do with what was heard on the taps.

THE COURT: You say they should get that?

MR. FEITELL: Questions that I put, for example, as to whether he heard certain things said on the wiretaps.

MR. MC ALEVY: Your Honor, I think perhaps the Court can inquire as to what the jury wants because I think it is quite a problem to interpret the jury's wishes

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MR. MC ALEVY: Your Honor, I think perhaps the Court can inquire as to what the jury wants because I think it is quite a problem to interpret the jury's wishes

2 in that note. My point is that Detective Eaton's  
3 testimony is somewhat extensive on direct examination and  
4 cross and, as Mr. Feltell says, it has been intertwined and  
5 I don't know how we can pick out some of the wiretap  
6 conversations, because in one breath detective Eaton will  
7 say he followed someone to such and such a place as a result  
8 of a phone call and the preceding sentence another whole  
9 paragraph they're talking about the interception, the other  
10 talking about the surveillance. I don't know how we can  
11 possibly break it up.

12 MR. FEITELL: For example, it is not that you  
13 are dealing with sporadic interjection of surveillance.  
14 Occasionally it breaks out in wholesale narratives such  
15 as what happened at 50th Street and Rockefeller Plaza and  
16 money in the bag and the back of the trunk and this and that,  
17 and the next thing he gets back into the wiretaps.

18 THE COURT: All right. What is the government's  
19 position?

20 MR. FELD: The government position, your Honor,  
21 very simply is the jury should be asked whether it wants  
22 to listen to the testimony solely with respect to what  
23 Detective Eaton overheard or whether they want to listen  
24 to that testimony as well as the testimony of  
25 surveillance in connection with what was overheard.

THE COURT: Is your position that if they want only what was overheard that is capable of being segregated?

MR. FELD: Yes. It would be difficult but it is within the realm of possibility if we work at it because there is a lot of intermingling in both the cross and the direct.

THE COURT: How long is Detective Eaton's testimony? My recollection is he wasn't on a very long time.

MR. FELD: About 100 pages.

THE COURT: My recollection is obviously wrong.

MR. MC ALEVY: 2164 to 2309.

THE COURT: It is long.

MR. MC ALEVY: I may say that there is an awful lot of colloquy at the side bar.

THE COURT: I just want to understand the issue between you. Nobody claims that all of the testimony ought to be read or is there such a claim?

MR. MC ALEVY: Just one other thing too. My point when I say it is difficult, I mean it is going to mean we are going to sit down, all of us and go over to see what we can agree upon. If we work for 20 minutes or so we can do it.

MR. FEITELL: I have been doing it. I have done it. I have gone quite far into this and I am almost concluded with respect to Eaton's direct and I have segregated out what the jury wants to hear.

THE COURT: Well, I take it that the government position is that whatever Mr. Feitell has segregated is too much, more than the jury asked for. Is that your position?

MR. FELD: No, maybe it is very much less than the jury asked for and not what the jury asked for at all. Because it seems to me that the jury has had the transcripts inside and it doesn't make any sense for them to ask for Detective Eaton's testimony with respect to the conversations that he overheard, which they have been looking at for at least several hours and their note is unclear about it.

It is quite possible they want the surveillance in connection with those conversations.

MR. FEITELL: That is speculative. They may very well want to know of his ability to identify voices.

THE COURT: I think for me my main interest is trying to figure out, and maybe because it is late afternoon, exactly what the issue is between you.

Sometimes I think the defendants want less than

the government wants and sometimes more. Can you define it in terms of that?

MR. FEITELL: I think I set it forth pretty clear but I will do it again.

There appears to be an intermingling of testimony regarding wiretaps and surveillance. They are not inextricably intertwined.

THE COURT: That is part of my problem, you and Mr. McAlevy seem to have a disagreement between you.

MR. FEITELL: Mr. McAlevy now agrees with me.

THE COURT: He agrees with you there is an intermingling but I gather he feels you can't feasibly unintermingle so you would have to give the jury the whole mingled paragraph.

MR. MC ALEVY: Judge, unless we can agree with the government, just blocking it out so it can be read, I say we can sit down with Mr. Feld and Mr. Feffer and go over it.

THE COURT: Is this area of agreement an agreement that I should ask the jury and then if they say they just want the testimony about overheard conversations, without references to accompanying surveillance, we will have to send them back to the jury room while you go to work and extract it. Is that the proposition?

MR. FELD: Yes.

2 THE COURT: On that are you --

3 MR. FEITELL: There is more to it. What about  
4 the cross?

5 THE COURT: I think the same rule applies to the  
6 cross as direct. I should have thought that was easy.

7 MR. FEITELL: Some of the questions that were  
8 brought out on cross are quite removed from any of the  
9 issues of surveillance. Should the jury come back and say  
10 they are interested in the wiretapping instead of  
11 surveillance, are we precluded from bringing out what we  
12 brought out on cross? Other features of the overheard in  
13 the conversations were about women, whether Jean Pino was  
14 somebody known to the authorities and lived in Jersey,  
15 et cetera. Those are the things I would like to bring out.  
16

17 THE COURT: Whatever you would like to bring out,  
18 the first problem is to ask the jury what they want  
19 brought out.

20 Now, define your problem for me. I have been  
21 told to ask the jury whether they want the wiretaps met  
22 without anything or where there occurs intermingling  
23 references to surveillance related to wiretaps, this  
24 business that you want to bring out on cross, how would you  
25 categorize that?

MR. FEITELL: You put the question and then we will

see what happens.

THE COURT: I want to know what the correct question is to put.

MR. FEITELL: How are you going to formulate it?

THE COURT: Whether they want Detective Eaton's testimony about the overheards strictly without more or whether they want related testimony about the surveillances accompanying the wiretaps or related to it.

MR. FEITELL: The first part of your thesis would cover me with respect to the cross.

MR. FELD: We would only add to your Honor's formulation whether they want the surveillance.

THE COURT: I can't ask them that. It says wiretap. I don't see how I can ask them do you want chocolate when they ask for vanilla.

MR. FEITELL: I have an idea. Could you send the note back and tell them the question is unclear and reformulate the question?

THE COURT: No. Bring them out and I will tell them.

MR. FELD: We have one further point in connection with the exhibits. The jury asked for Capra's sign-in sheets and handwriting exemplars which we have for them and they also asked for Exhibits 21A and B.



2 They have not asked for Exhibit 21 and it was  
3 Exhibit 21 about which there was contention as to whether  
4 Capra wrote that or not. I think it would be an  
5 appropriate inquiry to find out whether the jury wants  
6 21 or just 21A and B or all three.

7 MR. FEITELL: I object to that, Judge, because  
8 the jury has read the menu and put in its order. Now,  
9 the waiter would like to serve something they haven't  
10 ordered.

11 THE COURT: I think with such a colorful account  
12 of the problem I can't resist what Mr. Feitell just said.  
13 I am going to stick to the menu or the order sent in by the  
14 jury and I won't ask if they want an hors d'oeuvre or a  
15 dessert, you should pardon the expression, later on. Let us  
16 get the jury in, please.

17 (Jury returned to the courtroom at 3:25 p.m.)

18 THE COURT: Now, ladies and gentlemen, I think you  
19 have gathered by this time that notes from jurors not  
20 infrequently present legal problems to construe exactly  
21 what is wanted.

22 On the left-hand side of your latest note you  
23 list certain exhibits, 21A and B, Capra's exemplars, sign-in  
24 sheets. We are going to give you exactly what you asked  
25 for, not more and not less.

2 On the right-hand side of your note you have  
3 asked for Detective Eaton's testimony on wiretap and that  
4 has presented some small questions or at least a question.

5 I am going to ask you, Mr. Edgehill, if you can  
6 answer to do so and if not perhaps I will ask you to go  
7 back in the jury room and formulate an answer.

8 But the question is when you asked for wiretap,  
9 do you want the testimony of Detective Eaton both on  
10 direct and cross relating strictly to what was heard on the  
11 wiretaps, or do you want in addition any testimony that  
12 touches the surveillance accompanying or related to those  
13 wiretaps which makes a difference. Do you understand the  
14 question?

15 THE FOREMAN: Yes.

16 THE COURT: Do you know the answer?

17 THE FOREMAN: No, I think we'd better go back  
18 and come to something.

19 THE COURT: I think then you ought to sort of  
20 have in mind the nature of the testimony as you recollect  
21 it and see if, after you have chatted together, if you need  
22 it you can give us a description that more accurately  
23 embraces what you want and then please understand that when  
24 we have got the description, if we clearly understand it,  
25 it may take some time for the reporter and counsel to

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22 it you can give us a description that more accurately  
23 embraces what you want and then please understand that when  
24 we have got the description, if we clearly understand it,  
25 it may take some time for the reporter and counsel to

figure out what you want and see what we are all agreed upon.

We will wait to hear from you.

(Jury left the courtroom at 3:32 p.m.)

(Note received from the jury at 3:40 p.m.)

THE CLERK: "Testimony of Detective Eaton concerning his interpretation of the terms used in the phone taps at Diane's Bar, Hogie sandwich and so on."

"Would it be possible for the jury to have a repast now, coffee, tea or soda?"

THE COURT: Could I ask while we are waiting for Mr. Levenson whether there is agreement on this latest note about Detective Eaton's interpretation of the terms?

MR. FEITELL: I don't know if there is agreement. I would say that your Honor's ruling precluded the offer of testimony with respect to that feature of the case and Mr. Feffer went forward -- there was no testimony on the subject.

MR. SLOTNICK: I agree with Mr. Feitell.

THE COURT: Has Mr. Levenson seen this latest note?

THE CLERK: No, sir.

THE COURT: Please read it to him.

(Note re-read.)

THE COURT: By the way, I want to mark as a Court Exhibit another note in a different color ink which asks, "Would it be possible for the jury to have a repast now (coffee, tea or soda)? Please."

I adjudicated without the advice of counsel and let the marshal take orders for coffee, tea or soda and I understand that is in the process of being filled.

My recollection is that Detective Eaton was cut off from giving his definitions of terms and there is no such testimony as Mr. Feitell says. Anybody disagree?

MR. FEFFER: That is correct, your Honor.

THE COURT: All right. Then let us have the jury in and I will tell them.

MR. SLOTNICK: I ask your Honor to indicate there was none instead of saying it was cut off.

MR. STONE: Why not just write out there is no testimony?

MR. FEITELL: No, I would rather have them orally instructed.

THE COURT: All right, let us get them in.

(The jury returned to the courtroom at 3:45 p.m.)

THE COURT: As to the coffee, tea, et cetera, I understand that is being taken care of, ladies and

(Note re-read.)

THE COURT: By the way, I want to mark as a Court Exhibit another note in a different color ink which asks, "Would it be possible for the jury to have a repast now (coffee, tea or soda)? Please."

I adjudicated without the advice of counsel and let the marshal take orders for coffee, tea or soda and I understand that is in the process of being filled.

My recollection is that Detective Eaton was cut off from giving his definitions of terms and there is no such testimony as Mr. Feitell says. Anybody disagree?

MR. FEFFER: That is correct, your Honor.

THE COURT: All right. Then let us have the jury in and I will tell them.

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MR. FEITELL: No, I would rather have them orally instructed.

THE COURT: All right, let us get them in.

(The jury returned to the courtroom at 3:45 p.m.)

THE COURT: As to the coffee, tea, et cetera, I understand that is being taken care of, ladies and

gentleman.

Your other note says, "Testimony of Detective Eaton concerning his interpretation of terms used in the phone taps on Diane's Bar, Hoagie Sandwich, and other terms heard."

The answer to that note is there is no such testimony in the record, and, having told you that --

JUROR NO. 12: The question was not to the effect of his qualifications to interpret, not his interpretation. He didn't give one but his qualifications to make an interpretation. That was testified to.

THE COURT: I think subject to what I am about to discuss with counsel in your absence, I think there is nothing we can give you in response to the request as you now formulate it. However, I will have another conference with my lawyers and if there is a different answer we will call you out.

If you don't hear from us, we will wait until we hear from you.

In the meantime, let me ask you to retire again.

THE FOREMAN: That is the paper that we really want, that little note.

That is 21?

2 MR. FELD: Yes.

3 THE FOREMAN: That is the one they wanted.  
4 They made a mistake on the request.

5 THE COURT: On the number.

6 THE FOREMAN: Yes.

7 THE COURT: Mr. Edgehill is asking for Exhibit 21  
8 and he has been given it and with that will you please  
9 retire, ladies and gentlemen.

10 (The jury left the courtroom at 3:50 p.m.)

11 THE COURT: Let us all sit tight, please.

12 MR. SLOTNICK: I have an application.

13 At the time the note from the jury came in  
14 requesting 21A and B there was some conference between  
15 counsel as to 21. I asked the US Attorney whether they  
16 were going to do anything to indicate to the jury that  
17 that may have been the note they were indeed looking at and  
18 naturally the application was made to you, your Honor.  
19 That note was left on the table and prior to the foreman  
20 asking for it, Mr. Feld was waiving it back and forth.  
21 I think that is unfair on the part of the prosecution and  
22 therefore at this time I am asking for the withdrawal of  
23 a juror and a mistrial.

24 THE COURT: Were you waiving it back and forth?

25 MR. FELD: No, I didn't wave anything.



1  
2 MR. SLOTNICK: In that event I would request  
3 a hearing on the matter.

4 THE COURT: Well, I will tell you, Mr. Slotnick,  
5 that assuming you are right, assuming he was holding it up,  
6 I would think that would be regrettable. I would also  
7 tell you that, with all respect in the context of the note,  
8 it is perfectly clear that is what they wanted.

9 MR. SLOTNICK: Perhaps, your Honor, perhaps.

10 THE COURT: No perhaps, it is perfectly clear  
11 to me and I so rule and I was tempted to ask them whether  
12 they really know the numbers but there are some elements  
13 to the technicalities and when they ask for Capra's  
14 handwriting and sign-in sheets, they obviously had to be  
15 interested in the only piece of paper as to which there  
16 was some question as to Capra's penmanship.

17 MR. SLOTNICK: Not necessarily. I see it  
18 different.

19 THE COURT: Not necessarily but I think it is  
20 difficult on this record, in this setting, to reach any  
21 other conclusion.

22 MR. SLOTNICK: However, I indicate for the record  
23 that the only exhibit on defense counsel's table was that  
24 one exhibit which was in Mr. Feld's hand and dropped to  
25 the table at the time the juror pointed to it and the

exhibit is now being covered up by one of the books of minutes. If Mr. Feld will lift it up that will be the only exhibit on the table.

MR. FELD: You want me to lift this up?

THE COURT: If you want to lift it up, lift it up.

(Indicating.)

MR. SLOTECK: Thank you.

THE COURT: I don't think it warrants a hearing because I think that there are certain times when the Courts must simply look at the practical realities of the situation and I try to look at them here and I think the result does no injustice to anybody and gives the jury what it had to be wanting.

As to the pending question, I think there was some insipient testimony by Detective Eaton opening up the subject of his qualifications as an etimologist. My recollection is that was followed by some further very brief exploration of that subject in the absense of the jury and my suggestion -- well, actually I think the next day Detective Eaton came in and said he wasn't qualified to translate any of these terms.

Maybe they should have that.

MR. FEFFER: In fact, what happened is you asked me to lay a better foundation for the purpose of his

classification of certain words and I attempted to do that in front of the jury and not out of their presence and your Honor's ruling based on the answers elicited was that he was not qualified to interpret those particular words. The jury should be told that as it was a fact.

THE COURT: I am afraid Mr. Lawhe, Juror No. 12, had a better recollection of what happened than I do. As a lawyer, I would not consider that that testimony which constituted attempt to lay a foundation, is especially interesting to a tryer of the fact, but I don't think following Mr. Feitell and others, it is my job to tell the jury what they may hear, that it is in the record. So I think we ought to identify the passages and lines where this appears and give it to them.

MR. MC ALEVY: Judge, may I say that --

THE COURT: Mr. Feffer says he found it.

MR. FEFFER: 2191 is the first time that I put a question.

THE COURT: Give me the whole list.

MR. FEFFER: 2191 through approximately 2196.

THE COURT: Let us not be approximate.

MR. FEFFER: 2196. The government is willing to stipulate to the conclusion that your Honor found him not competent to testify.

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MR. FEFFER: 2196. The government is willing to stipulate to the conclusion that your Honor found him not competent to testify.

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MR. FEITELL: There is a broader issue and if we stipulate we will lose this point completely. The point is whether or not this man Eaton had the expertise. The issue is whether the terms being proffered were susceptible of expertise, which is a more serious problem.

The jury could conclude that while this particular officer wasn't expert enough to give his interpretation of the terminology, there is a body of expertise and they may speculate about it. I think that your Honor in colloquy before you made your ruling as to the expertise, your colloquy was that you knew of no such expertise so that is a different issue.

THE COURT: Mr. Feitell, you have a penchant and a talent of finding spirits and implications in what I say that are novel to me when I learn about them and here again that is true, although it is not terribly important, I wasn't trying to conjure up any such spirits. I was just trying to suggest that the record on this subject was barren as far as the jury was concerned.

I don't have a view on whether somebody might have expertise on such a thing in fact or in spirit. Let us scratch that. The question is whether there is any point in giving this to the jury and even if there is not, whether we are justified in dealing with the jury in withholding

from their testimony that is in the record that they have accurately described in a request to hear the testimony.

I think the testimony is before the jury. In theory they remember every word of it; in fact, they don't.

But they know how to describe what they wanted to be reminded of and I think, without playing games with them or trying to guess what the merits or the meaning is we ought to simply give it to them unless there is some eloquent reason for not doing so.

At the moment, is there any real reason?

MR. FEITELL: I think that blurs what your Honor's ruling was and what I say the record stands for with respect to it.

You were troubled as to whether or not this terminology was part of the argot and I don't think that counsel was suggesting that it was part of the argot and I think your Honor was troubled with that and that was the fundamental threshold problem.

This man could never have been an expert to something especially when there is no expertise.

THE COURT: I don't know whether there is any. You keep telling me that. He didn't establish his expertise, that is all that I rule and I did so rule.

1 I don't even know whether in trying to deal with  
2 spirits, Mr. Feitell --

3  
4 MR. FEITELL: I dropped that.

5  
6 THE COURT: You are dealing with some potential  
7 thing hurtful to you or the prosecution.

8 I don't know where this points anyway so it is  
9 hard for me to grapple with whatever your legal concern  
10 may be.

11 It seems to me that somehow if a witness didn't  
12 qualify, if he is a government witness, that would hurt the  
13 government case but I don't know where all this takes us.

14 MR. FEITELL: If your Honor is going to give  
15 that instruction, I think the jury should also be  
16 instructed that there was no testimony to establish  
17 that the terminology in the wiretaps itself was part of the  
18 argot.

19 THE COURT: I am not going to give any  
20 instruction to the jury. Juror No. 12 hit the nail on the  
21 head, he said he knows the man didn't qualify, he just  
22 wanted to hear what he said when he was trying to qualify.  
23 I think he could not have said it more clearly if he had  
24 spent several years in law school. I don't see any reason  
25 not to give him what he asked for.

MR. FEFFER: I would differ with one point. I

don't believe the question was he didn't qualify. I believe I questioned him whether he was qualified.

THE COURT: Read back what Mr. Lawshe said.

(Record read.)

THE COURT: I figure it falls about half-way between us, Mr. Feffer.

MR. FEFFER: I think he is interested obviously in whether George Eaton was qualified to testify about these conversations.

I believe the answer is no.

Is the government suggestion that would be told to the jury? Is that what you are saying, Mr. Feitell?

MR. FEFFER: The testimony was stricken, a portion of the testimony was actually stricken and that really brought on this whole --

MR. FEITELL: There is some testimony on 2191 which could be read to the jury starting on Line 11:

"Q Officer, has it been your experience in narcotics law enforcement -- I will ask you some certain questions with respect to certain of the words utilized in this conversation.

"The word chess, how do you interpret this word in the context of that conversation?



"A It was just a fact they are going to meet each other that night. They are going to play chess.

"Q What does the term big fellow mean to you?"

When it gets to this question --

MR. PEPPER: It is all stricken and for this reason I would suggest that the simple answer be given that he was not qualified to interpret these expressions or words they are interested in.

THE COURT: I have told them there is no such testimony in the record.

MR. PEPPER: This could be something further, telling them he was not at all qualified to interpret, which I think is the gist of his request and if they weren't satisfied they could come back and ask for testimony.

MR. FEITELL: I don't know, it doesn't seem an effort was made to qualify, with all due respect.

MR. PEPPER: Why not leave it to the jury.

MR. FEITELL: To say he was unqualified gives rise to the inference that there is a body of qualification that is susceptible to --

THE COURT: Well, listen --

MR. FEITELL: I would like to consult with my colleagues because I think it is a tricky question.

"A It was just a fact they are going to meet each other that night. They are going to play chess.

"Q What does the term big fellow mean to you?"

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MR. FEITELL: Today he was unqualified gives rise to the inference that there is a body of qualification that is susceptible to --

THE COURT: Well, listen --

MR. FEITELL: I would like to consult with my colleagues because I think it is a tricky question.

(Defense counsel confer.)

MR. FEITELL: I think I have the answer to this, Judge. The only testimony in the record, the only testimony in the record dealing with what the juror is asking about starts with the question at Line 11 on page 2191 and through line 18 which is his answer having to do with his experience, experienced counsel asked him his experience and it is a kind of convoluted question and not the answer that he got and that is all there is in the record and that is what the juror should get.

MR. PEPPER: I believe Mr. Feitell referred further, he moved to strike the testimony as to the interpretation of certain words.

Moreover, if you look at the note, and I could be mistaken, I am not sure which words they asked to be interpreted.

THE COURT: I have a Hogie sandwich.

MR. FEITELL: And other words.

THE COURT: And other terms heard.

MR. PEPPER: That line of inquiry was not permitted over Mr. Feitell's very objection and I think it would be very misleading. The fact of the matter is and the truth of the matter is he was not qualified to testify to these terms. That should be told to the jury, not something

factually untrue.

MR. FEITELL: I wholly disagree. He brought to the attention of the Court various authorities which he said substantiated the point and it has nothing to do with the issue as to the meaning of these particular words.

You failed entirely and completely with respect to your claim there is argot which embraces these terms.

MR. FEFFER: That is not correct.

We decided, your Honor, after thinking about it overnight, if I may finish, Mr. Feitell, that it didn't make any difference whether this detective from that chair interpreted these particular expressions or whether I was allowed to do it in summation, as I did.

The effect on the jury technically would be the same and that is the reason we chose not to ask the questions.

MR. FEITELL: That question starts on line 11 and says tell us about your experience in narcotics enforcement, et cetera, and there is a question dealing with your experience and that is what the juror wanted and if the answer doesn't come four square in the question, that is not our fault. That is what the record says.

THE COURT: This was not stricken?

MR. FEITELL: Mr. Feffer moved that it be stricken.

I move to strike "What does the term big fellow mean to you?". That is what I move to strike.

MR. PEPPER: What is "that?"

MR. FEITELL: His conclusion. Do you think I was going to move to strike the chess game when all he said was that it was a game of chess? I wanted that in the record.

THE COURT: Well, Mr. Feitell, I have trouble following you. If you were worried before that his to show the requisite expertise might give rise to an inference there is the requisite expertise, I would call the jury back and as I am on the verge of doing and just have read them this one question and answer and tell them that is all there is in this record responsive to their inquiry and you must rely on the highly improbable prospect that nobody on that jury, including Mr. Lawshe is going to have in his head a lot of this other stuff that you don't want read back to them or called back to their attention, I am led to believe there is some inconsistency in your position and again, I don't know which way it points, but I would like you to be consistent and I would like you to be satisfied that you are satisfied you are consistent and if that is what you wish, I will have this question and answer read to the jury.

MR. FEITELL: I need one more minute.

MR. PEPPER: While Mr. Feltell is talking to defense counsel, pages 2192, 2193 and 2194 have further questions put on this very subject.

THE COURT: Attempts to qualify him?

MR. PEPPER: That is correct.

THE COURT: Was that stricken?

MR. PEPPER: No, sir.

THE COURT: All right, read it to me.

MR. PEPPER: 2192:

"Q Officer, for how long prior to January 10, 1972 were you listening to conversations over Diane's Bar?

"A Repeat that time period.

"Q How long prior to January 10, 1972 had you been intercepting telephone conversations at Diane's Bar?

"A Approximately a month.

"Q How many conversations prior to this intercepted conversation between Stephen Dellacava and Jack Brown had you intercepted to the best of your recollection?

"A At least three that I can remember.

"Q After January 10, 1972, for the balance of that month, how many times did you hear Dellacava and Brown speak on the phone?

"A I can't recall how many times. It is at least one more after that.

"Q Did you ever hear any reference in other conversations between the same individuals to big fellow or small fellow?

"A On one other occasion I heard that."

THE COURT: All right. That is enough. If I am going to read the chess thing, I am going to read this because this was part of the unsuccessful efforts to qualify him and I just ruled.

That is what Mr. Lawshe asked for.

MR. FEITELL: May I make a record, Judge? I know you have ruled but I would like to make a record.

Now, if you go back over this colloquy, your Honor will see that I made a motion that testimony regarding big fellow meaning a kilo of narcotics be stricken and your Honor said, "I will at this time strike it out. You may pursue that, Mr. Feffer, and see if there is any difference later."

Then Mr. Feffer said now and your Honor said the only reason you said later is that there was something about the time.

He said could he just complete that conversation and what Mr. Feffer went on and did was in the nature of

developing expertise, he wasn't even ending up with that conversation.

THE COURT: Which, his asking about other conversations? About what is a big fellow and little fellow? Did you hear what he just read to me?

MR. FEITELL: That isn't testimony regarding the expertise, whether he ever heard these terms in the conversation previously.

THE COURT: It was testimony that Mr. Feffer in my ruling mistakenly elicited in your efforts to qualify this witness. I ruled that didn't work but Mr. Lawshe said he wants to hear what was asked him in this manner when they tried to qualify him. The fact that it failed does not make it non-responsive to Mr. Lawshe's precisely drawn question.

Now, if I am going to read the chess thing I am going to read the big fellow and little fellow thing and you made your record and that is the ruling on this subject.

And now the question is do I think we want to read both portions or do we want to read neither and if that is on consensus I will go with it and if it is not a consensus that the following portions be read I will designate it.



1  
2  
3 MR. FEITELL: In view of your Honor's  
4 indicated ruling to which I take objection, I am  
5 constrained now to take a fall-back position and that would  
6 be that the least damaging thing that could be inflicted  
7 upon us in the circumstance would be to indicate to the  
8 jury that no expertise was established.

9  
10 THE COURT: He indicated, he asked us to certain  
11 testimony and I told him in good faith that I didn't think  
12 there was anything useful of that nature to be read to him  
13 from this record.

14  
15 But that I would confer with counsel and see if  
16 that changed.

17  
18 The alternatives before the Court at this moment  
19 are these:

20  
21 One, to let it lie.

22  
23 Two, to call the jury back and read some  
24 testimony, not tell him any ruling. He didn't ask for that.

25  
26 You may choose between those because I have now  
27 focused and just because everything comes to an end and  
28 which do you prefer?

29  
30 MR. FEITELL: The former, to let it lie.

31  
32 MR. FEPPER: That is acceptable, your Honor.

33  
34 THE COURT: Anybody take a different view?

35  
36 MR. MC ALEVY: I would just like to say I am

surprised for the Court even to consider the requests made by the juror. I don't know if Juror No. 12 speaks for the other jurors.

THE COURT: You now say the question we have been beating our gums over is an improper question?

MR. MC ALEVY: Yes.

THE COURT: I understand what you say and I reject it. Is there any other observation that anybody wants to make?

MR. SLOTNICK: In substance your Honor should tell them the detective did not testify to any interpretation and that would be it.

THE COURT: I am not going to repeat something I already said to the jury. They are busy on more important things than being dragged out for a repetition of other things that people wish to say.

The effective consensus ruling is to leave it as it is and we will do that.

MR. FEITELL: My objection is noted I take it.

THE COURT: I can't imagine it would fail to be noted, Mr. Feitell, unless Mr. Russell's hands fell off during the several times you repeated it. He must have gotten it at least once.

MR. BLACKSTONE: Your Honor, I assume the jury

is having their coffee and donuts or whatever now.

THE COURT: I never intrude on that. I authorized it and they would order it in the jury room and we being hardy folks and graduates of law schools are not free to go and get it but if you have a friend who like the marshals can bring it to you, enjoy it.

Let's hang around and see what they need next.

MR. SLOTNICK: Aren't they waiting for some response from us.

THE COURT: I don't think so.

MR. FRITELL: I think your Honor did say we would take a few minutes to discuss it.

THE COURT: Read back what I did say.

(Record read.)

THE COURT: That, incredibly, is actually what I meant to say.

(The following took place at 5:30 p.m.):

THE COURT: This note, Court Exhibit 13, I think has been read to you:

"We have a hung jury. We do not agree on conspiracy Count No. 1."

(Jury note marked Court Exhibit 13.)

THE COURT: Subject to the advice of counsel, I will call the jury in and tell them to deliberate some more and that if they have not thus far been able to agree on Count 1, they might find it useful to turn their attention to other counts which are before them for decision.

Any comments?

MR. FEITELL: Preliminarily, I would say that I object to any procedure to be followed by your Honor with respect to giving the case further to the jury for the reason that your charge with respect to conspiracy instructed the jurors they were to consider the acts and statements of certain co-conspirators against defendants once it was established that those defendants were members of the conspiracy and that that instruction was applicable to the substantive count and that part of the instructions by your Honor should prevent the jury from further considering the substantive counts, in view of the

fact that they have been unable to conclude that any of the defendants are members of the conspiracy.

That is all initially.

MR. SLOTNICK: I would object to it based upon the fact that the indication they have is that there being no decision on Count 1, your Honor instructing them to go to Counts 2, 3, 4 and 5 it seems to me as if your Honor is indicating perhaps that there is some situation separate from Count 1 that they are to consider with respect to Counts 2, 3, 4 and 5 and this would be putting the judicial opinion before the jury and I most respectfully object to it.

MR. LEVENSON: Your Honor, I think in view of the fact that there are some jurors that do not make out a conspiracy, obviously they disbelieved certain testimony which would be essential for them to find defendants guilty of any of the substantive counts. I think if they came in with a verdict of guilty on substantive counts, it might be considered an inconsistent verdict. Therefore, I object to giving the instructions.

MR. STONE: I would object especially considering the second count, which names Mr. Morris as the recipient of the alleged narcotics. If the jury would find any of the other defendants guilty of Count 2, they

1 rsg 34  
2 may very well infer that by doing that they have  
3 re-established Mr. Morris' role in the conspiracy,  
4 realizing he is not a defendant in Count 2, and we  
5 consider his position in this conspiracy.

6 It would be an unfair lever for the jury and I  
7 respectfully move at this time for declaration of a mistrial  
8 and the withdrawal of a juror.

9 MR. MC ALEVY: I will join in all brother  
10 counsel's applications but particularly Mr. Stone's with  
11 respect to Count 2 and further with respect to Count 3  
12 where Morris is named since if they wanted to find  
13 Mr. Morris guilty with respect to the conspiracy, I think  
14 it would be unfair to ask them to consider that count  
15 with Mr. Harris. With regard to 4 and 5, which occur  
16 at the same time, this is really two different brands of  
17 narcotics, but they could have agreed upon conspiracy,  
18 if they can't agree upon a conspiracy which states an  
19 overt act, they certainly could not agree on Counts 4 and 5  
20 and all it would do I think to unsophisticated jury, if  
21 you instruct them to go further, they might feel they  
22 might be able to come back with a guilty verdict on 4 and 5,  
23 which seems to me unlikely.

24 But that might end up with a compromise verdict.  
25 I respectfully ask for a mistrial.

1  
2 MR. SLOTNICK: I join in the application for the  
3 declaration of a mistrial at this stage of the proceeding.

4 MR. BLACKSTONE: I also join in the applications  
5 and suggest to the Court that the jury should decide what  
6 it should deliberate on and the Court should not  
7 indicate other areas of counts because the Court doesn't  
8 know what it has discussed.

9 MR. FEFFER: There are certainly independent  
10 bases that the jury can find the four defendants named in  
11 Counts 2 through 5 guilty as opposed to the conspiracy  
12 count.

13 I think even asking the jury if they are able  
14 to reach a verdict on 2, 3, 4 and 5 at this time is not  
15 improper.

16 THE COURT: I am not going to ask them but I  
17 will tell them that there may be a way for them to proceed.  
18 All right, let's call them in.

19 (Jury returned to the courtroom at 5:40 p.m.)

20 THE COURT: We have read and considered your  
21 most recent note, ladies and gentlemen.

22 As perhaps you will anticipate, in the light of  
23 the length of the trial that has been placed before you  
24 for your consideration, we are certainly not planning to give  
25 up at this point and consider that you are, in your

expression, a permanently hung jury.

You indicate that you are in disagreement with Count 1 and you don't indicate other things.

Let me simply say this to you:

First, let me remind you that there are five counts that have been placed before you for decision. I am not at this time withdrawing any of them from you. I will remind you that the content and the process of your deliberations are matters for your good judgment in deciding how you should proceed and what you should pay attention to.

With that reminder, let me suggest to you that you may find it helpful in attempting to advance your deliberations, if, for the time being at least, you were to lay count 1 to one side and turn your attention to the other four counts, each of which, as I repeat, states a separate offense and presents separate charges for your consideration.

With that, I think I will not instruct you any further at this time, except to ask you once again to retire and deliberate further.

(The jury left the courtroom at 5:45 p.m.)

MR. FEITELL: I have a comment in the form of an objection to the terminology you used.



I may be incorrect but I think your saying something to the effect "We are not giving up", the possibility that this is not a hung jury, permanently hung jury, I think that that sort of indicates a consensus on our part in which we join with you, regarding what "we" think should be done and I am not a party to any "we." I think that was an unfortunate choice if indeed you did say that and I object to it.

THE COURT: You want me to call them in and say you don't agree?

MR. FEITELL: No, I think the damage has been done, Judge. I am not going to ask that you call them back. I think it was unfortunate choice of terminology on your part.

MR. SLOTNICK: Your Honor, I would except to your charge with respect to reminding the jury there are five counts. That is within their province and they are the fact-finders. I am sure they are well-aware there are five counts but your Honor instructing them has indicated to them that even though they may be, as they have used the term hung on count 1, they can or should, and I emphasize the word should find a verdict on the four other counts, as a spectator at the trial I indicate to the Court

that if they were to find not guilty on Count 1, I don't see how they can possibly find any other verdict on the other four counts and if they are hung on Count 1, they must be hung on the other counts.

MR. MC ALEVY: I would just say I think as a matter of law that if the jury were to come back and find these gentlemen not guilty on Count 1 or hung, I feel as a matter of law they could not return a verdict of guilty on 2, 3, 4 and 5.

Judge, one other thing: You said shall I call them back? Could you inform defense counsel as to what you would do to cure that statement, if you did say it?

THE COURT: I will tell you, I think it is an observation which is trivial in the extreme and if anything is unfortunate, the record will show that my belief is that unlike many of the interesting and substantial points Mr. Feitell has made to me, that one is in the category of misfortunes but I would say if his judgment was reflected in yours and consider seriously that if all defendants think I should give it now, I would not give it and this would be more preposterous and I don't know that I would tell it but I just can't see where this argument goes to.

MR. MC ALEVY: I certainly would object to this

type of instruction.

THE COURT: Of course you would and the way which I occasionally use is meant to suggest that these rules are because, which may be made over your protests, reflect a legal judgment which doesn't impair your objections or the errors you preserved on the record in any way. I just don't know whether that observation of Mr. Feitall was the misfortune he meant but I think we talked about it enough.

I will ask the marshals to plan dinner at 7 and you will be notified as I will when the jury goes out to dinner and I will ask that the marshals let us know through the clerk where the jury goes, and, of course, we will refrain from going there.

(The following took place at 6:30 p.m.):

THE COURT: This note which reads "We would like to hear testimony regarding Count 2, August 1970."

THE CLERK: Mr. Stone isn't here yet.

THE COURT: It has just been pointed out that Mr. Stone is not here so I guess we will wait for him.

(Pause.)

THE COURT: Mr. Stone, I have directed that all of us be on hand. I know about the problems of parking in the neighborhood. I suggest that you take a train tomorrow.

MR. STONE: The problem is getting a train late at

night and that is the reason I drove.

THE COURT: This note says "We would like to hear the testimony regarding Count 2, August 1970."

I think the answer is that, subject to arguments pro and con, there are various items of testimony that may or may not relate to that count and we can't give them anything in response to a note like this.

MR. PEPPER: That is not correct, your Honor. As a matter of fact, the testimony with respect to this count came solely from John Ramos. It began on line 9, page 286 and goes to line 13, page 291. There was no surveillance of this meet and to my recollection, no cross examination as to this portion of Ramos' testimony.

MR. LEVENSON: Your Honor, with respect to that particular request, I think it would be improper for us to single out portions of the testimony with respect to the wording of that note.

Now, if they are interested in some particular person's testimony, I would say we would certainly do it for them. I don't think we should do the research for the jury, that makes us part of the deliberative process and I am not certain that that is the only testimony with respect to that incident.

It seems to me I remember something about one other

person testifying. I can't recall offhand. I would call that to the attention of the jury that we can't deliberate for them or do their research for them and ask if they -- I have no objection to your saying this matter is mentioned in Ramos' direct examination and if that is what they want to hear, we have no objection but not to say that this is all the testimony with respect to Count 2.

MR. FRITELL: May I be heard, your Honor?

My recollection differs from Mr. Levenson.

As far as I know that is the only testimony in the record regarding this matter and to tell the jury there is some amorphous individual whose identity we can't pinpoint who also testified to this, is very prejudicial to the defense and I would object to it.

THE COURT: Are there other defendant's views on this?

MR. SLOTNICK: I haven't read the record with regard to this point, your Honor. To be perfectly honest, I couldn't make a representation one way or the other.

THE COURT: Neither could I.

Any other defense views?

MR. MC ALEVY: Judge, if this is going to be their policy, certainly we can anticipate them coming back and asking the same thing with respect to Counts 3, 4 and 5,

1  
2 which I think then we will instruct them to just rely upon  
3 their own recollection and we cannot to through the  
4 transcript to meet their demands because it would be  
5 virtually impossible with regard to counts 4 and 5, no  
6 question about that, and it would be setting a precedent.

7 MR. STONE: I would agree it couldn't be done  
8 completely the way Mr. McAlevy wants to but certainly you  
9 can ask the jury to remember, to exhaust their recollections  
10 first advising them in many cases it is difficult to find  
11 the exact places where the testimony occurred, and you would  
12 rather not substitute the transcript for their memory.

13 THE COURT: Mr. Blackstone, do you want to be heard?

14 MR. BLACKSTONE: No.

15 MP. MC ALEVY: If I might just add with respect  
16 to Count 2, it is my recollection of the testimony that that  
17 is the only testimony with respect to August 1970 which is  
18 set forth by Mr. Feffer and I would have no objection to that.

19 THE COURT: That is not my recollection.

20 With deference to you and Mr. Feitell and Mr.  
21 Feffer, I am not going to argue recollections. I am not  
22 going to give the jury the identified testimony in response  
23 to a note of this kind so whether there is a majority or  
24 minority view, that is going to be what I will tell them.  
25

1           MR. PEPPER: May I be heard on this point?

2           THE COURT: I heard you once on this point.

3           MR. PEPPER: But I think when the jury comes back  
4 and asks for the testimony that has been adduced with  
5 respect to a substantive count and counsel amongst themselves  
6 are able to agree within 10 or 15 minutes more that the  
7 testimony that we have pinpointed is that testimony, that  
8 the jury should be able to hear that testimony.  
9

10           THE COURT: Well, if the law were that when  
11 counsel agree the Court could stay at home, since I have  
12 theater tickets tonight, my life would be more easy  
13 than it is. But that is not the law, and, with all  
14 respect to all of you, I don't agree so we have to leave it  
15 that way. Let us get the jury in, please.

16           I take it from my not having any other information  
17 that you all agreed that the marshals could make telephone  
18 calls for the jurors who want a change of underwear or  
19 what it is they want?

20           MR. LEVENSON: Yes, your Honor.

21           THE COURT: Dinner I am told is at the same place  
22 again.

23           MR. SLOTNICK: I have read the section the  
24 government pinpointed -- is the jury coming in?

25           THE COURT: They can come in. I have heard enough

about it.

(Jury present at 6:40 p.m.)

THE COURT: We have your note, ladies and gentlemen, and I am not able to give you what you appear to think you want, what testimony or evidence may or may not relate to any count in the indictment or whether there is evidence relating to any count in the indictment is a question for the jury. We cannot respond giving you what may be thought to be the evidence on a count.

Your task is to recollect the evidence in terms of what has been placed before you, witnesses, exhibits and so on.

If you want any of those concrete things, please describe them to us and we will give them to you.

But it is not suitable, for reasons that really aren't useful to go into at length, for the lawyers and the Judge to get together and agree or not agree that certain evidence may or may not relate to some count, and then give you that.

So you are directed to use your recollection of the evidence and if you have a specific identifiable reference to any portion of this record, testimony or exhibits, send us a note about that and we will undertake to



find it and give it to you.

Now, if you will please retire again for a little while for your dinner hour.

(Jury left the courtroom at 6:42 p.m.)

(Jury note marked as Court Exhibit 14.)

MR. SLOTNICK: I was just saying that I have read that portion that the government indicates is the only testimony with respect to Count 2 and if they wanted another counsel stipulated to it and your Honor allowed it, I would have no objection to it being read.

THE COURT: All right. We will all be informed when the jury goes to dinner and let us take an hour and 15 minutes from then.

(Jury adjourned for dinner from 7:00 p.m. until 8:25 p.m.)

(The following took place at 9:20 p.m.)

THE COURT: The note which I understand has been read to you, which will be Court Exhibit 15, asks: Can we find a defendant guilty of the conspiracy charge if he is found to be a member of the conspiracy during the period but not guilty of any of the listed overt acts?"

And I think, subject to hearing something unexpected, the answer is yes, with an explanation which is, simply, they have to find beyond a reasonable doubt

1  
2 the three essential elements, but that a person can be  
3 found guilty of a conspiracy if any member has been proved  
4 to have committed one of the overt acts.

5 I don't think there is much question about the  
6 law but I will hear anybody who has a different view.

7 (court Exhibit 15 marked.)

8 THE COURT: Hearing nothing let us get the jury in.

9  
10 MR. STONE: I think that it is a very complicated  
11 question not as a matter of law but at this time of the  
12 night, after two days, to have the jury come in and asking  
13 other questions. I think that we ought to have an  
14 opportunity, and I say this in behalf of myself and one  
15 or two of the other attorneys, to discuss this with a  
16 possible suggestion for some additional charge to the  
17 jury.

18 I think that a simple yes to answer that question  
19 at this time would be unfair to the defendants.

20 THE COURT: I say yes with an explanation.

21 MR. STONE: The explanation as you offered is an  
22 explanation I would be happy with but I don't know if you  
23 are going to give any explanation but my gut feeling is  
24 I am not happy with it and I would like an opportunity to  
25 discuss it with one or two other attorneys here if we could  
only ask about five minutes.

THE COURT: No, I can't see any reason for that.

The jury asked the question. With respect to you, Mr. Stone, we have been together before and it seems the answer is absolutely clear and not questionable.

MR. STONE: The only thing that makes it questionable is when they ask the time charged, I think they are considering the problem of a conspiracy terminating as to one or more of the defendants and another conspiracy beginning. Otherwise, they wouldn't have those words in the question.

The simple question, the overt act must have been an overt act committed while that person was a member of the conspiracy, so the explanation you offer wouldn't encompass all the possible variance.

For example, taking Morris as a defendant, the conspiracy as a matter of law as to Morris ended on October 31, 1971. If the overt act was committed by one of the other conspirators, concerning Morris after October 31, 1971, and that was the overt act that the jury found was committed beyond a reasonable doubt, Morris cannot be convicted of a conspiracy.

THE COURT: Is that right?

MR. STONE: I would think so, if you are charging the conspiracy count.

THE COURT: I think Pinkerton is perfectly clear that is not the law.

But, in any event, assuming that is so, it seems to me you are conjuring up difficulties that are not suggested by the question. I am not going to retract any of the charge I read to the jury. If you want me to read the whole charge on conspiracy, I might consider that. But I don't think it is necessary or warranted in the light of the question. They have asked a very simple question.

MR. MC ALEVY: Your Honor, may I ask what your explanation would be and could you please tell us in case you have any objection to it, we can voice our objection before you just give the explanation to the jury?

THE COURT: Sure. I am going to tell them that first, out of an abundance of caution, it takes two to conspire. They can't find a conspiracy of one person.

Then I am going to tell or remind them that they can't convict anybody unless each and every one of the three essential elements I gave them, which I will repeat, are proved beyond a reasonable doubt.

And then I am going to tell them that with those things in mind, the answer is, as I said, yes, with an explanation, that if they find those elements, the third of them requires proof of an overt act but does not require

a particular defendant you are considering be the one who committed the overt act.

Then I will let them go back. That I think is the law. And I just don't think we should complicate it.

MR. STONE: You don't think that the overt act has to be committed while the defendant was a member of the conspiracy?

THE COURT: Under the charge that I gave them, they would follow that in any event. But let me think about that for a minute and maybe I will so instruct as I reconsider.

Does the government have a view? I think that ought to be included in the circumstances of this case, in the cautionary instruction.

MR. FELD: Your Honor, I would only like to add to your formulation to say that the overt act need not have been committed by the defendants on trial but could have been committed by a co-conspirator not on trial.

THE COURT: I understand that but what about the question I am on now? Shouldn't it be an overt act, contrary to what I said a couple of minutes ago, that is committed while the particular defendant you are considering was a member of the conspiracy?

MR. FELD: No, it could have been committed before

1 he was a member of the conspiracy, your Honor. If it was  
2 committed before.

3  
4 THE COURT: How about after?

5 MR. FELD: Unless they found he was not a member  
6 of the conspiracy, and then after he ceased being a member  
7 of the conspiracy and the overt act was committed, there  
8 was no overt act prior to that time by anyone, then I think  
9 that the Court would be correct.

10 THE COURT: All right. How does this sound to  
11 you defendants?

12 MR. BLACKSTONE: Could you formulate that now how  
13 you propose the cautionary instruction as it has application  
14 to Mr. Harris?

15 THE COURT: Mr. Feld suggests that you can be  
16 responsible for an overt act that occurred before you  
17 joined the conspiracy, but not for one after you left it,  
18 if you leave it. I don't understand that to be good law  
19 but it may make sense in terms of the circumstances of  
20 this case.

21 My belief of the law is that you are responsible  
22 for an overt act before or after your membership,  
23 provided there was a conspiracy and you did become a member  
24 and it was a foreseeable incident of the conspiracy.

25 MR. BLACKSTONE: Your Honor, I am not sure that

1  
2 your Honor's reasoning seems to be that you are not sure  
3 of the law but even the analogy that you gave the jury  
4 of people planning a bank robbery and then one of the three  
5 individuals who plans it then positively withdraws and the  
6 bank robbery is committed, obviously he could not be  
7 convicted of conspiracy since he withdrew before the  
8 overt act.

9 THE COURT: You would agree with Mr. Feld that  
10 far?

11 MR. BLACKSTONE: Yes.

12 THE COURT: How about before he joined.

13 MR. BLACKSTONE: The law is clear then. He can be  
14 responsible for that which antedates.

15 MR. FEFFER: Your Honor, the possible difficulty  
16 in going into this is really you are going further than the  
17 jury had asked.

18 THE COURT: Certainly do you think it is going  
19 to help anybody except possibly Mr. Harris and Mr. Morris?  
20 And I am not clear that they are entitled to it because  
21 whatever they requested on this business of withdrawal and  
22 termination and so on, I have given them.

23 MR. FEFFER: That is correct.

24 THE COURT: And the jury has not asked for a  
25 repetition of that. I am going to leave it alone at this

time because I don't think they have invited me to go into that and I am just going to give them what I said I am going to give them, the essential elements and prior to that, just the thought because I don't want the jury coming in with a verdict of guilty of a one-man conspiracy, I want to make clear that a conspiracy has to have two or more members in it.

All right, I think that is what we will do.

MR. FEFFER: Your Honor indicated that you don't want the jury coming back with a verdict of guilty of one defendant but there are people here who were co-conspirators.

THE COURT: I understand that.

Let me say I don't want a verdict with one conspirator.

MR. FEFFER: Fine.

THE COURT: Frankly, I think it is fair to remind them that it takes two in this case to conspire. I don't think it is a realistic process that you are going to get one defendant convicted and the others acquitted.

But, again, I don't see that anybody is hurt by reminding them of this elementary proposition.

Does anybody object to it? All right.

You had something, Mr. Slotnick?



MR. SLOTNICK: The first problem I have is that the jurors have at this point today in deliberating some 12 hours, with lunch and other time, I ask your Honor not to open up the charge with yes as an explanation. Yes is a very simple answer to a very complicated question and I think in their state of or at least if I am not projecting my state of fatigue into their possible state of fatigue, I think they are working much harder than I did today, the yes may stick and the explanation may not.

I would ask your Honor just to say that it cannot be answered by a yes or no and the explanation is as follows.

THE COURT: No. The fact is, Mr. Slotnick and I don't want to debate on the record with you now your point of ill health or youth but you look all right to me.

MR. SLOTNICK: I am not ill, I am tired.

THE COURT: All right, the answer to the question is indeed yes, period! But I think an explanation is appropriate. Bring the jury in.

MR. FEPPER: May I make one further statement?

I think that certainly the answer to the question is yes. I am just wondering if it is necessary for the Court to go into the aspects of membership in the conspiracy because the note seems to presume that they

understand membership and --

THE COURT: It cannot hurt if they understand it to say it again.

MR. FEFFER: Fine.

THE COURT: I don't see why I have to do this. I will give them the three elements and remind them, as I think the jury should be reminded at every turn that they cannot find anybody guilty until all of the elements are proved beyond a reasonable doubt.

Now, if we will bring the jury in, please?

(Jury returned to the courtroom at 9:30 p.m.)

THE COURT: All right, ladies and gentlemen, in response to your note, "Can we find the defendant guilty of the Conspiracy Count 1 if we feel he is a member of the conspiracy during the time period included in the indictment but not guilty of any of the listed overt acts?"

The answer to your question is yes with an explanation, which is not lengthy, but which I will give you.

Part of the explanation, let me remind you that it is basic to the concept of conspiracy that it must include two or more people. You can't have a conspiracy of one person.

Then let me remind you that you cannot convict anybody of the charge of conspiracy unless you are satisfied

1  
2 of each and every one of the three essential elements and  
3 though your question relates only to the third of those,  
4 let me remind you of all three, because all three are  
5 essential.

6 First, you must be satisfied that a conspiracy  
7 of the kind alleged did exist during some portion of the  
8 period alleged in the indictment.

9 Second, you must be satisfied before you may  
10 convict any defendant that he was a member or a participant  
11 in a conspiracy, that he knowingly and willfully became  
12 a participant and, third, coming to the subject of your note,  
13 you must be satisfied beyond a reasonable doubt that  
14 someone of the conspirators, not necessarily the particular  
15 defendant upon whom you are focusing, and not necessarily  
16 any defendant named as a defendant before you here,  
17 committed at least one of the overt acts, one of the  
18 seven that I left with you, during the period of the  
19 conspiracy and for the purpose of furthering it.

20 That I think is the answer to your question and  
21 I think with that I will ask you to retire again.

22 MR. STONE: May we approach the side bar?  
23

24 THE COURT: All right.

25 (At the side bar.)

MR. STONE: It is my position that each one of

those allegations have to be proved beyond a reasonable doubt, including the overt acts. Since you repeated the elements I request that you add the reasonable doubt aspect.

THE COURT: I said they all had to be proved beyond a reasonable doubt.

MR. SLOTNICK: You did not so charge the jury.

THE COURT: All right.

(In open court.)

THE COURT: I meant to say, and it appears that perhaps I didn't say it, that each and every one of these three essential elements must be proved beyond a reasonable doubt and that includes, of course, the third essential element, the proof of an overt act that must be beyond a reasonable doubt but, again, turning to your question, it does not have to be an overt act by the particular defendant with whom you are concerned, or even any one of the six on trial here, but any one of those that you find to have been co-conspirators in this case named in the indictment.

JUROR NO. 5: Will you repeat that?

THE COURT: The overt act, if you find one proved beyond a reasonable doubt, does not have to have been committed by the particular defendant with whom you are

concerned, if you find the three essential elements. It can be an overt act that you find proved beyond a reasonable doubt committed by any one of those named as co-conspirators in the indictment, and if you look back at the indictment, remember the evidence, you will recall there was a fairly substantial number of people named as or alleged to have been co-conspirators.

MR. SLOTNICK: May we approach the side bar a moment?

(At the side bar.)

MR. SLOTNICK: I would ask your Honor to charge that the overt acts must have been committed in furtherance of the conspiracy, which I think your Honor deleted.

THE COURT: I said it.

MR. SLOTNICK: I except to the charge where you indicate there are a substantial number of acts left with you. That sort of gives weight to and recognition and I respectfully ask you to charge the jury that that has no meaning, whether they are substantial or even one.

THE COURT: That application is denied.

(In open court.)

THE COURT: All right, you may retire again, please.

(The jury left the courtroom at 9:35 p.m.)

(The following took place at 10:45 p.m.)

THE COURT: I understand that there is a note, which is Court Exhibit 16 and it has been read to you and that counsel are undertaking to identify the parts of the Ramos testimony that the note requests.

(Jury note marked as Court Exhibit 16.)

THE COURT: I am also informed that the jury bus is here and I take judicial notice that it is 10:45. I think perhaps it makes sense to ask you to suspend for the night and let them go and then to request that you all, between now and say 9:15 tomorrow, identify the pages that you think are asked for. Meet here at 9:15 and see if you agree. If you agree I will read it to them at 9:30 and if you disagree, I will try to iron out the disagreement.

MR. FEFFER: We have picked out the pages before with respect to the previous court exhibit, the August transaction and they are ready to go. My suggestion is to ask the jury whether they prefer to have it read to them now or wait until tomorrow morning.

THE COURT: Well, first, let me ask you -- I have forgotten, these are the pages that we talked about earlier?

MR. FEFFER: That is correct.

THE COURT: They wanted read before.

MR. FEFFER: That is correct.

THE COURT: I think it was agreed those were the proper pages.

Mr. McAlevy?

MR. MC ALEVY: Judge, I have looked at this and this is the direct. I would like an opportunity to review the entire Ramos testimony. I think it would only be fair to everyone concerned and all counsel want to do that. It is my recollection that that is the only testimony.

THE COURT: I will let you do that but will you do me one favor? I have had great difficulty getting this show on the road at the times I set. Can I please request that you all get here around 9:15 and see if you agree and if you don't agree, let me work it out so that at 9:30 we can give it to the jury.

MR. FEITELL: I have an application. Can we start at 10 o'clock? These are herculean efforts, going into the late hours. It is really very taxing on some of us.

THE COURT: Well, as Mr. Slotnick observed before, it is most taxing on the jury who are away from home and I think we owe it to them to give them as full an opportunity to get started as possible.

So I am directing that you get here at 9:15 and

SOUTHERN DISTRICT COURT REPORTERS

UNITED STATES COURT HOUSE

FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4380

1 I think I live at least as far away, upstate New York,  
2 to coin a phrase, as almost any of you and I won't compete  
3 in point of age and so let us get here at 9:15.  
4

5 I will direct that that be done and I will  
6 expect it to be done.

7 As to the rest of it, I think it is time to  
8 quit for tonight so I will have the jury in and tell them  
9 we will read these pages at 9:30 tomorrow morning.

10 MR. BLACKSTONE: The only thing, I would like to  
11 come here at 9:30.

12 I worked it out with Mr. Levenson as far as the  
13 pages that they are requesting and I have nothing further  
14 to add to the pages that we have outlined. I would like to  
15 be here at 9:30.

16 MR. STONE: We are not named in that count, your  
17 Honor.

18 THE COURT: You wouldn't care, whatever everybody  
19 agrees on?

20 MR. STONE: We will agree.

21 MR. BLACKSTONE: Mr. Levenson and I looked at this  
22 before and worked it out and know what we are reading.

23 THE COURT: Look, we will start at 9:15. I don't  
24 know what the lawyers will come up with that may have a  
25 bearing on your client. But you ought to be here.



Let's have the jury in and let them go home.

(Jury returned to the courtroom at 10:50 p.m.)

THE COURT: Now, ladies and gentlemen, we have your note requesting certain testimony of Mr. Ramos. I am also informed that the buses are here and you are aware, I am sure, that it is late.

The plan is that we will identify that testimony by the first thing tomorrow morning, which for you will be 9:30, and we will ask that arrangements be made for you to be here at 9:30 and we will plan to have it read to you promptly then.

And now, on behalf of all of us, let me --

THE FOREMAN: Your Honor, would it be possible to finish tonight. That is the only problem that is holding us up now.

THE COURT: Are you suggesting that you think there is a possibility of your arriving at a verdict?

THE FOREMAN: Yes.

THE COURT: How long do you think you want?

THE FOREMAN: After we hear this particular testimony, maybe no longer than a half hour, 45 minutes at the most.

THE COURT: Do you wish to try?

THE FOREMAN: Yes.

1 THE COURT: Are you all awake enough to do that?  
2  
3 Anybody have a different view on the jury?

4 JUROR NO. 12: Some of the ladies are worried  
5 to go home that late.

6 THE COURT: Well, that would be manageable,  
7 but I will tell you very frankly, I think you have to  
8 come to understand the problem. When you ask for certain  
9 testimony the attorneys, on behalf of their clients,  
10 each have the duty to participate in making sure that you  
11 get what you ask for and not less and sometimes it is  
12 a problem of seeing that you don't get more because you are  
13 the ones deliberating.

14 And while I think our main concern is for you  
15 because you have the prime responsibility now, I must  
16 also take into account the concerns of these parties, the  
17 defendants and the government, and of their attorneys who  
18 are also a little worn out and I am afraid that I can't  
19 impose on them the obligation to make certain that they  
20 have made this identification correctly tonight at this  
21 late hour.

22 And so, although all of us would have a  
23 preference, if it were possible to help you arrive at a  
24 verdict tonight, and all of us do understand the hardship  
25 for you of staying away from home over another night, I think

I don't need to spend a lot of time telling you about these things and I don't need to labor its importance to everybody and I think therefore you will understand that the decision that I make quickly on balance, that just the thing to do is to have to ask you to stay over tonight and I will.

All of us understand the pressures and other directions, Mr. Foreman, so let me ask you to repair to your hotel and the marshals will again undertake to get you here in the morning at the appointed hour and I am directing very firmly that we be ready for you when you get here at 9:30 tomorrow morning and I believe that will be the situation.

So with all that talk, let me not keep on talking any longer and I trust you understand and I trust you will have a pleasant evening as possible and bid you all good night

(Jury left the courtroom at 10:55 p.m.)

THE COURT: All right, let me repeat especially in the light of what just happened, I hope I don't have to spell it out, let us be on time and let us be ready at 9:15 and let us give this business to the jury at 9:30 and let them proceed. Good night, gentlemen.

(Adjournment taken to November 21, 1973 at 9:15 a.m.)

1 rsg 1

4089

2 UNITED STATES OF AMERICA,

3 vs.

73 Cr. 460

4 JOHN CAPRA, et al.,

5 Defendants.

6 New York, New York

November 21, 1973 - 9:30 a.m.

7 (Trial resumed.)

8 (Jury not present.)

9  
10 THE COURT: Good morning. Have counsel agreed on  
11 the portions of Ramos' testimony wanted by the jury?

12 MR. FEFFER: No, we are unable to agree.

13 THE COURT: What is the area of difference?

14 MR. FEFFER: The government submits that the  
15 testimony with respect to the August transaction or count 2  
16 in the indictment by Ramos begins on line 9, page 286 and  
17 goes through page 291, line 13.

18 I believe that Mr. Davenson and Mr. Blackstone,  
19 who represent the two defendants involved in this count,  
20 both substantially agree with the government with respect  
21 to that.

22 Mr. Bletnick and Mr. McAlevy have a disagreement  
23 with respect to this and they also assert there are various  
24 portions of the cross examination which are relevant, which  
25 the government does not agree with.

SOUTHERN DISTRICT COURT REPORTERS

UNITED STATES COURT HOUSE

FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580



MR. BLACKSTONE: I don't think he meant me.

MR. FEFFER: Mr. Levenson and Mr. Stone.

THE COURT: First, are the portions that Mr. Feffer told me about agreed to be pertinent or not?

MR. SLOTNICK: Your Honor, we have a difference in two pages. I don't think any defense counsel stipulates that anything is correct from the transcript but page 288, line 22, where Mr. Feffer's first question directed the witness to August of 1970. That question was sustained as being leading and Mr. Feffer went back and again directed his attention to August 1970 which is at the beginning of 289, line 9. But we should read to ourselves the prior question to notice that he is defining in his subsequent question and we say that is where it begins.

MR. FEFFER: What Mr. Slotnick is forgetting about is the payment of the money for the two kilos of narcotics, the \$48,000, which is covered in the preceding pages, which is the money paid by Morris in Detroit to Ramon.

THE COURT: All right, I rule for the government on that.

Now, what other disagreement is there?

MR. SLOTNICK: The other disagreement we have, your Honor, as far as I know at this point are the various

portions of cross examination that I have culled out, that I believe is germane in this issue.

Page 511, your Honor, cross examination as to whether he violated parole and he indicated that he violated parole when he got arrested in Toledo. It is our contention if he did deliver the heroin and the jury so believes that is a parole violation and he lied on the witness stand in cross examination.

THE COURT: I overrule that. I overrule the contention that this is responsive to the note, which is Court Exhibit 16.

MR. SLOTNICK: Page 519, your Honor, line 14 through line 20.

THE COURT: Yes, overruled.

MR. SLOTNICK: Page 739, line 5 through line 14.

THE COURT: All right, we won't read that either.

MR. SLOTNICK: May I indicate to your Honor I am attempting to bring his attention to pertinent cross examination as to inconsistencies.

THE COURT: I understand what you are trying to do. I am construing the note and making a ruling in the light of what I think the note says.

MR. SLOTNICK: Next is page 786, line 21 through 787, line 17.

1 THE COURT: That is denied too.

2 MR. SLOTNICK: Again, I tender it for the same  
3 reason.  
4

5 The entire page 789.

6 THE COURT: That is denied.

7 MR. SLOTNICK: And page 814, line 7 through line  
8 15.

9 THE COURT: No, I don't think that is responsive  
10 to the note at all.

11 MR. SLOTNICK: Two other brief matters.

12 Your Honor, we have had placed in evidence  
13 numerous airline tickets referring to trips, at cetera.  
14 We would like it charged to the jury that in 1970 there  
15 is no evidence of this trip or trips made by the airline  
16 tickets.

17 THE COURT: Yes, I won't do that. They haven't  
18 asked for any further instruction on that subject. It is  
19 the third day of deliberations and I am not going to  
20 give gratuitous instructions on the evidence, having  
21 refrained throughout from instructing on the evidence,  
22 what the evidence is or isn't.

23 MR. SLOTNICK: Finally, I request in view of the  
24 fact that tomorrow is Thanksgiving, I would most  
25 respectfully ask your Honor to charge the jury as to what

his plans are on that Thanksgiving and we respectfully request that you indicate to the jury that if there is no decision, that they will be discharged tomorrow to go home and have Thanksgiving and come back. That is a concern.

THE COURT: I think that is a very likely result and I would hold off of that in the light of last night's discussion until at least lunchtime but please remind me.

MR. SLOTNICK: I except to your Honor's refusal to charge the other things I ask.

THE COURT: Are we ready?

MR. MC ALEVY: I have just two requests.

I draw your attention to page 593, on line 20, your Honor.

THE COURT: As related to the transaction of August 1970.

MR. MC ALEVY: Certainly.

THE COURT: I disagree with you and I won't have it read.

MR. MC ALEVY: Another one is page 742 line 20 to the next page on line 1.

THE COURT: Yes, that is denied.



1 MR. STONE: Your Honor, I except to the  
2 reading of the portions of the testimony concerning  
3 Mr. Morris' name. The jury previously indicated that  
4 they appear or at least yesterday appeared to be hung  
5 on the conspiracy count. Any highlighting of the evidence  
6 in the count where Morris is not named --

7 THE COURT: Wait a second, Mr. Stone. It is  
8 early in the morning and I am supposed to have patience.  
9 Do you remember what the note says?

10 "We would like to hear the portion of Ramos'  
11 testimony involving the alleged sale of two kilograms of  
12 heroin to Alan Morris on or about August 1970."

13 All right, I may have cut you off but it seems  
14 to me you do not have --

15 MR. STONE: I forgot Morris' name was mentioned  
16 in the request.

17 MR. MC ALEVY: I have one thing, Judge about  
18 the article in Toledo in the record because --

19 THE COURT: No, just tell me what it is, the  
20 page and the line.

21 MR. MC ALEVY: Page 882 from line 20 to page 883,  
22 line 6, concerning the possession of heroin, anyone  
23 possessing it, that he ever saw it.

24 THE COURT: All right, you have your record clear

and I deny that.

All of these suggestions with respect to you gentlemen seem to go perhaps beyond the bounds of what the jury asked for.

MR. STONE: Your Honor, I ask very simply that you tell them Morris is not a defendant in Count 2.

THE COURT: That is denied.

Anything else, gentlemen?

MR. SLOTNICK: If I may have a moment I want to show something to Mr. Levenson that may affect his client.

MR. LEVENSON: Your Honor, Mr. Slotnick called my attention to a brief portion of my cross examination on page 881.

THE COURT: Which you say should be read now?

MR. LEVENSON: Around line 7 or so.

THE COURT: To where?

MR. LEVENSON: Down through 882, line 3 -- no, line 19, I am sorry.

THE COURT: Line 19? That looks to me as though it is germane.

Do government counsel have any objection to that? Will you read the lines?

MR. SLOTNICK: 881, line 17 to 882, line 19.

MR. LEVENSON: Your Honor, may I make one further --

MR. SLOTNICK: I am sorry, your Honor, our allegation goes to 883, line 6.

MR. PEPPER: I would object to anything beyond line 19.

THE COURT: Let me see the rest. That is all Mr. Levenson asked for.

We will stop at line 19 on page 882.

MR. LEVENSON: Have you seen the last question on page 882 which appears to me to have definite relevance to this particular incident?

THE COURT: Yes, I have heard what Mr. Slotnick said, I did see it and by my lights it does not seem to me to be responsive to the jury note but the earlier portion is and we will read that.

Is there anything else?

MR. LEVENSON: Yes, your Honor. There has been a frequent use of the word germain, not the noun but the adjective during the course of these instructions. I think the --

THE COURT: In my instructions to the jury?

MR. LEVENSON: Every now and again.

THE COURT: I don't remember using it once.

MR. LEVITON: I think you did say that the issue is germane.

THE COURT: You want me to avoid it? That is fair enough. I had somewhere in my mind the notion that I would avoid it but I don't know that any harm has been done. I will bear in mind your suggestion from hereon.

THE COURT: We are going to read the jury page 286, line 9 to 291, line 13 from the direct and page 281, line 17 to 282, line 19 from the cross and let us please have the jury in.

MR. SLOTNICK: We most respectfully except.

THE COURT: Mr. Slotnick, you have been in court a lot and is there any doubt about the elementary proposition of standing up and saying you take exception when your position has been rejected or an objection is overruled and that is unnecessary?

MR. SLOTNICK: Yes, your Honor, as to a charge to the jury I must except.

THE COURT: All right.

MR. MC ALEVY: May I note I take exception and adopt Mr. Slotnick's exceptions.

THE COURT: All right.

(Jury present.)

THE COURT: You know your note of last evening



hasn't been satisfied and we would like you to hear the portions of Ramos' testimony involving the alleged sale of two kilograms of heroin to Alan Morris on or about August 1970.

The testimony that I have ruled is appropriately responsive to your note will now be read to you.

Let me just say that again you are the Judges of the evidence. When you ask for certain testimony, it is necessary for counsel and the Court to get together and find out what testimony answers your description.

Sometimes, as you undoubtedly gather, there will be disagreements about this.

Somebody thinks more ought to be in, somebody thinks less ought to be in, and all the Judge does is make in this special situation a sort of threshold determination of relevance in the sense that it seems to be responsive.

Please remember that you are the Judges of the evidence, you are the people who decide what is responsive and what is not and how relevant and significant any items of testimony may be.

I thought we are to make that clear so you will understand why sometimes there is a delay in getting back to you and also so you will not lose sight ever of the

2 fact that relevance and significance ultimately are parts  
3 of your general domain, you are the authorities over the  
4 facts.

5 All right, let us read the passages that we  
6 designated.

7 (Record read as indicated.)

8 THE COURT: That is the testimony you wanted,  
9 ladies and gentlemen. Please retire.

10 (Jury left the courtroom at 10:05 a.m.)

11 (The following took place at 10:25 a.m.)

12 THE COURT: The jury has reported a verdict and I  
13 will have them in and we will take it in open court.

14 (Jury present.)

15 Mr. Foreman, Mr. Edgehill, the note that you went,  
16 which will be marked as the next court exhibit, has listed  
17 each count and each defendant and has indicated a verdict  
18 as to each defendant named under each count. I will mark that  
19 as a court exhibit.

20 I have looked at the note but have not announced  
21 its contents but on looking at it I perceive the verdict  
22 is the same as to each individual defendant under each and  
23 every count, is that correct.

24 THE FOREMAN: That is true.

25 THE COURT: And that is your verdict?

THE FOREMAN: Yes. I have a copy. Can I read from it?

THE COURT: You can announce it.

THE FOREMAN: The verdict of the jury coming to a decision, the verdict is guilty.

THE COURT: On each count?

THE FOREMAN: On each count.

THE COURT: As to each defendant?

THE FOREMAN: Yes.

THE COURT: It is so written here?

THE FOREMAN: Yes.

THE COURT: Do you wish the jury polled?

MR. SLOVICK: Your Honor, I ask that each and every juror be asked whether that is his personal verdict.

THE COURT: I will ask the clerk to poll the jury.

THE CLERK: Members of the jury, listen to your verdict as it stands recorded, you indicate you find each defendant guilty on each count indicated in the indictment?

(All jurors affirm the verdict.)

THE COURT: All right, ladies and gentlemen. I never comment on a verdict. I guess I should say almost never and when I proceed now to extend to you on behalf of the Court and everyone involved our appreciation, it is not for how you decided because when I said that is for you, I

meant exactly that.

But we and the public are in your debt for a long, earnest, arduous period of jury service, more arduous than the usual case not obviously a pleasant task for anybody but particularly for lay people who are not regulars in the courthouse.

Let me extend my hope that as at least partial repayment for your contribution to the administration of justice, each of you will have some sense of achievement to which you are entitled because it is people like you who keep this strange institution, since we as a nation are almost alone in keeping it intact, this institution of jury trial flourishing and healthy, keeping the business of criminal law closer to the people than it would be if bureaucrats, and I don't use it as a dirty word, I mean bureaucrats like Judges and others, would have sole responsibility for such grave matters.

I will stop with that and thank you very much and your term of service is over and Mr. Swanciger, the clerk, will give you your certificates of service and we will say good-by and send you on your way with our good wishes.

(Jurors left the courtroom.)

THE COURT: The note which contains the verdict



determinations will be marked as Court Exhibit 17.

(Court Exhibit 17 marked.)

THE COURT: Are there motions at this time or do counsel wish to reserve them?

MR. SLOTHICK: Your Honor, on behalf of the defendant I wish to reserve all motions to the date of sentencing.

THE COURT: Is that the desire of everybody?

MR. LEVENSON: Yes, your Honor.

MR. FELTELL: Yes.

THE COURT: You may do that.

Let me say to you that I read everything that comes in, whether I understand it seems a different question. When I allow counsel to reserve motions to the day of sentencing, it is my expectation that if there are any motions of substance, they will be filed and served a couple of weeks in advance so they can receive due consideration. Please be guided by that and whatever motions you make I will, of course, consider.

Mr. Feld?

MR. FELD: All I want to say if there are going to be written motions on papers, the government would like adequate time to respond and if counsel intends that, maybe a schedule ought to be fixed once we know the date of

sentence.

THE COURT: Whatever the date of sentence, any written motion should be in two weeks in advance of that date.

Now, is there anything to be said about the status of these defendants while they await sentence?

MR. FELDT: The government application, your Honor, is to have the defendants Capra, Guarino, Dellacava and Jermain remanded pending sentence.

Mr. Harris is in custody and Mr. Harris is also in custody.

The reasons for the application are these, your Honor: We have just been through a long trial in which guilty verdicts were returned on all counts of the indictment against these individuals.

The evidence clearly and overwhelmingly demonstrated a massive conspiracy beginning in 1969, continuing right up until the spring of this year, to distribute large quantities of heroin and cocaine in New York and other parts of the country.

These men were not the small time drug pushers. Capra, and Guarino, are major distributors, if not the major wholesalers of heroin and cocaine in New York City.

The evidence demonstrated, I think beyond a shadow

of a doubt, that they are a danger to the community, and that they will continue to be a danger to the community if they are allowed to remain free on bail during the course of any appellate proceedings in this case.

There is also, in light of the jury verdict and in the light of what remains, a strong possibility of very substantial sentences in this case, and a very substantial risk of flight on the part of either one of these or all four of them.

They are men with obvious means, at least Mr. Capra, Mr. Guarino and Mr. Dellacava. They are capable of providing large sums of money to themselves and to their families in the event of flight.

The risk of flight is substantial in the government view.

We believe that the evidence has shown this case a number of people were killed who were connected with this trial. Mr. Marabel was killed, Mr. Milletto was killed, Jack Spada's body turned up two or three weeks ago, murdered in Sanguettes, New York, a co-conspirator in this case and a co-defendant in other cases.

There are government witnesses who are not in protective custody, there is a very, very strong motive to vent anger against these witnesses and that possibility will

1  
2 exist unless these men are in jail.

3 Of course, I am sure that defense counsel on  
4 behalf of Mr. Capra and Mr. Guarino and Mr. Dellacava will  
5 say that there may be some substantial legal issues on  
6 appeal in this case.

7 I don't think that the trial presented any  
8 substantial issues on appeal but we did have a series of  
9 pretrial motions.

10 I think that one factor that obviously the  
11 Court has to consider in a matter of this kind is that but  
12 I think that the Court has ruled that the government, the  
13 evidence which the government introduced was lawful and  
14 admissible and that the government feels strongly that  
15 we can uphold any rulings of law on appeal in this case and  
16 that whether or not there are substantial issues for appeal,  
17 we believe that that factor is far outweighed by the two  
18 factors that I have already described, the fact these men  
19 pose a danger to the community and the fact there is a  
20 substantial risk of flight.

21 We ask that they be remanded until the date of  
22 sentence.

23 THE COURT: I will hear from defense counsel.

24 MR. SLOTNICK: Your Honor, with regard to the  
25 defendant Capra, it is obvious your Honor knows that he is



presently on \$250,000 bail, placed by the closest people to Mr. Capra, who Mr. Capra loves and he would not injure.

You also know that Mr. Capra's assets include his home, seized by the government and some other means --

THE COURT: I didn't know that.

MR. SLOFNICK: Yes, we had discussed that at one time.

THE COURT: It slipped my mind but I take that representation.

MR. SLOFNICK: To the extent of 600 or \$800,000.

Mr. Capra appeared and signed in on each and every day he was supposed to.

Mr. Capra appeared this morning, your Honor, when there was no question but that what the jury was going to do after last night. I think that in all due candor the Court and the record and everybody else in this court at a quarter to 11 realized what the verdict would be.

It was obvious to Mr. Capra and I represent to the Court I indicated to Mr. Capra at a quarter to 11 while we were working on the record that there was no possibility of any other verdict but a guilty verdict in view of the question brought out and the attitude of the jury as I observed it.

Mr. Capra appeared this morning.

THE COURT: By the way, I don't doubt for a minute what you have just said and it is not time for persiflage but I will say it was not obvious to me in the light of the history of the way this jury functioned. In retrospect you were righter than I was but I do credit what you are saying, what your prediction was and it was correct.

MR. SLOVICK: Only to indicate to the Court that my client came in here with the attitude, with a belief, an understanding as a result of what the attorney told him, that he would be convicted this morning.

Unfortunately, our prediction came true.

With regard to the other issues, your Honor, as far as the government alleges Mr. Capra poses a danger to our community, I don't think this record indicates that he has done anything with regard to violence.

The government mentions three individuals who have been killed, allegedly related to this case in terms of being co-conspirators.

From what little I know about it, Mr. Marabel's death came many, many years before this case was brought to the attention of the Grand Jury.

I think the government credited Mr. Millette's death to someone else.

Mr. Spada, I don't know too much about except from

reading a little squib in the Times.

I don't know that there is any evidence that my client had anything to do with that.

The government witness is not in protective custody, the one is Roco Sassone, who, if anything, helped my client by indicating he never heard of him.

There is no danger posed to him nor can I say without getting involved with persiflage, how although I must at this time, there is no government witness who faces any danger from my client as I observed.

I think the only way the witnesses now can help him is if they recanted and indicate that what they testified to wasn't correct.

There is no basis, other than the statements of Mr. Feld possibly that he poses a danger to the community.

I admire Mr. Feld's candor in indicating there were lengthy pretrial hearings and the issue of frivolity on appeal I imagine would be overriding in your Honor's mind.

I have taken exception to your pretrial rulings most emphatically, traces of heroin allowed in which another defendant had but yet it came in the trial and was used against us.

There were overheard on the tape recordings that contained my client's voice at a period of time when the police had no warrant to listen to any part of that tape recording and without relitigating that yet it continued.

THE COURT: You don't have to labor that. I do not believe as I am presently advised that appeal in this case will or would be frivolous.

MR. SLOTNICK: I can lastly indicate that my client, and it has been shown through Mr. Ramos, the government witness, he has a wife and family, and that he appears to be rather dedicated to them and I don't think that, again, he would attempt any sort of flight whatsoever, especially, especially under the restrictions the Court placed on him and I ask your Honor again not to remand on this eve of a holiday and note that there is no legal basis for same.

MR. MC ALEVY: If the Court please, Mr. Guarino is presently out on a total of \$325,000 bail and said bail was made by having two of his brothers, one is a lawyer sign a personal recognizance bond in the amount of \$250,000 and cash bail is \$75,000, made by putting three houses up along with bank books of the two brothers and two sisters and his brothers-in-law.

Mr. Guarino is married with two children. I won't



labor the point because you already stated that you believe there is merit to the appeal because of the motions that we certainly made.

I certainly say, your Honor, I don't know what date will be set for sentence but the man surely needs time to take care of his affairs.

If there was going to be flight in this case, your Honor, I certainly believe it would have happened prior to what happened here today. There were many opportunities and as the government graciously, back in the summertime, I guess the early fall, upon request said that these gentlemen didn't have to sign in any more and there was a lapse before the trial date was set. If Mr. Guarino was going to flee, that would be the perfect opportunity for him.

I respectfully say to this Court that despite his guilty verdict, the man has never given me any intention of fleeing. He came here and faced the music. I ask that he be given the same right of any individual, that he not be punished, there is absolutely no basis for Mr. Feld's statement that this man would flee.

With respect to Mr. Feld's bringing in these three murders, I certainly know nothing about that, but I do know, your Honor, from being in this case the last three

2 or four months, know that Mr. Spada and Mr. Milletto were  
3 involved in other cases that were heard right here in this  
4 jurisdiction and to point a finger at Mr. Guarino I think  
5 is tinged with vindictiveness.

6 There is no proof whatsoever and if Mr. Feld has  
7 any we ought to have a hearing on it and let him put on the  
8 record so we can amply read but that and this is just a  
9 man's statement concerning these men and is terribly  
10 unfair at this time and it just seeks to prejudice my  
11 client, just his statement. There is no other proof that  
12 I know of, your Honor.

13 I certainly believe, sir, that this man, as he  
14 sits here today, there is no danger to the community  
15 whatsoever. I again adopt what Mr. Slotnick said. The  
16 only person that I could think of that would be Mr. Sassone,  
17 I think he came in and told the truth about what happened  
18 and never had one mention with respect to my client.

19 I can't think of another witness, your Honor,  
20 that he would be angry about except certainly Mr. Ramos.  
21 But that could be for a different reason and Mr. Ramos  
22 is not a problem.

23 I recall the outburst in the courtroom, Judge,  
24 and I don't think it was much of an outburst because  
25 Mr. Ramos was here by himself and the jury had left and

when you think about the relationship between these people, with respect to the God Father, helping the man out after prison when he came out, it might have been called for, even though your Honor instructed him.

I request you, sir, not to hold that against this man in any event. There may be some personal vindictiveness.

Mr. Conforti, maybe again, but there is no problem, both men are in protective custody.

I just ask this Court let this man have this opportunity to straighten out his domestic affairs, because, Judge, if you are going to put him in jail at this point, the family is definitely going to suffer, his own family. Whether the Court believes it or not, the man does have outside interests and I would be glad to show them to the court. I just ask that he be allowed to stay out of jail until sentence date and, of course, perhaps the government can renew their application. But in the meantime, your Honor, I certainly ask that.

THE COURT: Mr. Feitell.

MR. FEITELL: Much of what I will want to say has already been said, Judge. But to particularize a little bit, I think it is important to point out that Mr. Dellacava certainly, although the government says he does, I don't think

1  
2 there is any intention of this man and he doesn't have  
3 the means to possibly evade the reaches of this Court and  
4 the United States Government.

5 He lives modestly with his wife and children in  
6 a three-room apartment in the Bronx with a relatively  
7 modest rent being paid. There are no savings of any  
8 substance. His wife is not a person of means.

9 There is already substantial bail posted and the  
10 means to provide that was through the assistance of  
11 various relatives who pooled all of their assets and  
12 houses and bank books in order to keep Mr. Dellacava in  
13 communication with his family.

14 I think it is important also to point out that  
15 he has been fairly regularly employed during the period  
16 of time that he has been out on bail, and has attended here  
17 regularly and signed in as requested and his whereabouts  
18 have been known throughout and there is a complete record  
19 of attendance.

20 With respect to at the very beginning of the  
21 trial, the government made some assertions with respect  
22 to the possibility of flight and your Honor looked into  
23 those assertions and came very quickly to the thought  
24 of rather than broaching the subject now with  
25 particulars, we are taxed with generalities, the same

2 generalities that to me constitute boiler-plate that one  
3 could hear with respect to almost any case in these Courts.

4 The assertions, the three persons who are no  
5 longer with us, there isn't an iota or speck of proof to  
6 indicate that any of these defendants, know anything about  
7 or had anything to do with that.

8 Indeed, it would seem to be that it would be in  
9 their strongest interest that those unfortunate acts would  
10 never have occurred because as individuals of reasonable  
11 experience and intelligence, certainly who would have been  
12 guided by the attorneys in the best fashion, they would  
13 well know that any shenanigans carried on prior or during  
14 the trial or at any time would necessarily blow up in their  
15 faces and it is unfortunate that by reason of speculation  
16 this should operate against them at this point. Certainly  
17 it wasn't in their interest to have any of these features  
18 developed and be brought to the Court's attention.

19 Then there are the considerations that operate  
20 under the bail reform act which I am sure your Honor is  
21 also going to take into consideration in addition to the  
22 prior good record of all of the defendants.

23 Mr. Deliacava on whose behalf I speak now he has  
24 no means to evade the jurisdiction of the Court and certainly  
25 hasn't indicated a pre-disposition to flee. He has deep and

1  
2 extensive family ties. He is engaged productively and  
3 not in a criminal way clearly and it would just be  
4 foolhardy to indicate in the slightest that the presence  
5 of these individuals on bail in the short period of time  
6 which is allowed to them now to remain with their  
7 families prior to the date of sentence, is going to give  
8 them a full opportunity to engage in nefarious criminal  
9 acts which are going to constitute a danger to the  
10 community. There is nothing to indicate that and I am sure  
11 if the government had anything to pose to your Honor  
12 to indicate otherwise, your Honor would have the facts  
13 rather than speculation to deal with and, at least, we could  
14 attempt to rebut the facts. It is very difficult to  
15 rebut speculation.

16  
17 Now, also with respect to the issues in the case,  
18 we are going to appeal here and they are substantial  
19 particularly with respect to Mr. Dellacava because I  
20 think your Honor, if I may recall just briefly the  
21 decision and memo that you wrote with respect to the  
22 suppression hearing connected with the night of the  
23 arrest, I do recall that your Honor asked the government  
24 very carefully to consider not putting that evidence into  
25 the case because you were much troubled by it and said it  
was a very close issue and I think, as the case turned out,

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it may very well have been the determinative issue which brought Mr. Dellacava into the conspiracy, what was found in his vehicle that night, the trace in the gutted gym bag.

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So I think on all counts, not only of the other defendants but Mr. Dellacava is entitled to remain at large on bail, reasonable bail, during the few weeks that remain prior to the sentence date under the same conditions that prevailed heretofore, which have insured their appearance always and at all times.

13  
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16  
MR. LEVENSON: Your Honor, I won't belabor the obvious points that were made so well by counsel. I just want to call one or two personal items with respect to my client to your Honor's attention.

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23  
Firstly, with respect to my client being a danger to the community, the only individual who is not in protective custody that could conceivably be a victim of any violence against him by my client might be Rocco Sassone and I think if you recall the testimony, Sassone made some statements which perhaps were helpful to my client, that he believed he was a big gambler.

24  
25  
Secondly, my client confided in me sometime ago that he knew Rocco Sassone was going to be a witness against him. As a matter of fact, he was told that by

Rocco Sassone and nothing had been done to him and certainly he had the opportunity if he was inclined to do so before.

Now, it is over six months since my client has been out and he appeared when required in Court and there is no fleeing on his part. He apparently does not have the assets to retain private counsel and to this extent he is indigent and clearly this would place a limiting factor on his ability to leave the jurisdiction if he were inclined to do so.

He has a wife and four children, living in a house, and obviously it is not something you do on the spur of the moment.

There was a brief outburst in court as the Court will recall on the first day of trial, wherein my client yelled something at Mr. Ramos. Again, I subscribe to Mr. McAlevy's statement that I think that under the circumstances, particularly in view of the fact Mr. Ramos was Mr. Jermain's son's God Father, and obviously had a close relationship, the statement was perhaps understandable, if not in good taste.

For those reasons I request that my client continue on the same bail conditions that he was before.

THE COURT: Let me say as to your pretrial



1 questions for appeal, I gave counsel a memorandum on the  
2 auto search of Mr. Dellacava and I have not yet filed it  
3 because I thought the newspapers might pick it up. I  
4 don't know how hurtful it would have been but that is the  
5 reason for that.  
6

7 I will file that in the office of the clerk  
8 in the next week or so.  
9

10 I will also file in the office of the clerk in  
11 the next week or two, as soon as the trial schedule permits,  
12 an account of the reasons why I rejected the minimization  
13 contentions, and of the reasons for denying motions to  
14 suppress the suitcase and contents taking in the Toledo  
15 search, just for your information.

16 I think that the evidence in this case is an  
17 overwhelming demonstration of a very major course of  
18 dealings for huge amounts of money in narcotics.

19 I don't violate any of the rules about the  
20 need of exercising and extending discretion, at least  
21 I don't think I do, when I say that at first blush all of  
22 us in this room must have a sense that the defendants are  
23 confronted with the prospect of substantial prison sentences.

24 I believe that in all the circumstances there are  
25 two convincing reasons for not allowing these defendants  
to remain at liberty while they await sentence:

First, based upon all the circumstances that have been disclosed to me in the trial and prior thereto at the bail hearings, I am very doubtful that even an increase in the money conditions of bail would supply the requisite assurance that the defendants will not flee.

Secondly, having come to know something about the nature of their careers, I do believe within the meaning of the bail reform act that these defendants left at large are a danger to the community. I don't have reference to assaults upon people, witnesses, or otherwise. But I think it is exceedingly likely that men who have devoted their adult lives for so long to a pattern of gross lawlessness may be expected at times of stress to continue in those ways, especially when they already face substantial prison sentences.

Now, for those reasons, I am about to order these defendants remanded, but an odd and yet human circumstance intervenes.

Mr. Slotnick mentioned, I think Courts ought to look and take into account what may seem trivial to everybody in the setting of the whole case but that this is the Thanksgiving Holiday. It is a family holiday and my preference without wanting to be unduly sentimental is to put them at liberty until Friday for that holiday and then

to require them to be subject to the penalties of bail jumping and things that counsel are familiar with, to surrender themselves on Friday to be remanded and await sentence.

It is my thought that if that is desired by defendants, in the light of what I have said, the day or two of rest that would have to be very closely circumscribed and I would want the defendants to go from here to their families and stay there and to come back here on Friday.

I would be prepared to hope that the government could invest the resources, if it thought it necessary for surveillance, for some limited period so that in spite of the rather unpleasant duty of dealing with this kind of matter at all, the Court could appear to be less than absolutely inhumane.

Is there anything the government wants to say about that?

MR. FELD: I can understand the Court's feelings, your Honor, but I think from what I know of the testimony in these records as to what the men were doing Thanksgiving, Mr. Ramos testified they all went to the Havermyer Club without their families and got drunk and snorted cocaine. That is the way they spent Thanksgiving.

THE COURT: The conditions of their release would provide they shouldn't go and get drunk and snort cocaine.

MR. FELD: But as to this notion of spending Thanksgiving with their families and at the family hearth and cutting up the turkey is simply not characteristic of what they have done on Thanksgivings past. I think that it poses an unjustifiable risk.

THE COURT: Well, do you think if they were directed to repair directly to their homes from here and I don't want to put law enforcement people to an undue burden and expense, do you think you could have some sort of surveillance maintained to see they are not going anyplace but home and back here?

MR. FEFER: May I respond to that?

The notion of asking law-enforcement officials to sacrifice their Thanksgiving Holiday working when they would not work otherwise, to leave their families to surveil the houses of the four people just convicted of a narcotics violation, the answer very simply is that it would put a great burden on the people, to find people to place these men under surveillance for the next 24 or 36 hours.

The men provided would be definitely men who were otherwise going to spend time with their families.

THE COURT: Well, that is an argument. I thought

1 you could get people on duty to see that they went home  
2 today, which is not Thanksgiving and have some means of  
3 checking that they stayed home and came back Friday.  
4

5 MR. FEFFER: Very definitely not. The men  
6 working tomorrow have other assignments, it would mean getting  
7 a whole new group of men who weren't going to work for this  
8 purpose. I think what Mr. Keld said as to the way these  
9 men spent their prior Thanksgiving has some merit and is  
10 pertinent when we consider how they spend tomorrow.

11 MR. SLOTNICK: I am not a member of the law-  
12 enforcement agency but an officer of the Court. I would be  
13 willing to do the following. The record may indicate that  
14 Mr. Capra resides close to where I reside. I would repair  
15 with Mr. Capra to my office so I can take care of a few  
16 matters as I must and then go home with Mr. Capra, make  
17 sure he went home. Tomorrow morning before I would go out  
18 for Thanksgiving I would call Mr. Capra's home and make  
19 sure he is there and come back home and spend dinner with  
20 my family and make calls to his home and Friday morning I  
21 would go to Mr. Capra's home and pick him up and drive him  
22 down here, your Honor. I think that I can be an effective  
23 law-enforcement agent as any detective and if Mr. Capra  
24 fails to answer my calls I will indicate to the Court that  
25 I would immediately call and indicate that and I will call

2 them in case they are fearful something is going to  
3 happen to me.

4 There is also the New Rochelle Police Department  
5 which regularly surveils the area and during the course  
6 of this trial I have been informed by my client that they  
7 are surveilling his home.

8 That is not the issue right now.

9 The issue is that I will serve as a police officer  
10 and make whatever arrangements are necessary to satisfy  
11 the government and to maintain the proper surveillance of  
12 Mr. Capra so that he can spend this Thanksgiving with his  
13 family.

14 THE COURT: That sounds like a cogent and  
15 constructive thought. Do you say that if he in the  
16 course of your surveillance is not at home as he is supposed  
17 to be you would report that?

18 MR. SLOTNICK: Most certainly, your Honor. If the  
19 Court ordered me to do so I would.

20 THE COURT: I would not order it. I can't order  
21 you to do that and I assume if you are going to do that and  
22 to administer that that Mr. Capra would waive any attorney-  
23 client privilege to the extent of your doing what you said  
24 you would do, right?

25 DEFENDANT CAPRA: Yes, sir.

MR. MC ALEVY: Your Honor, as you know I am admitted as I say in New Jersey and I have been thinking that Patrick Guarino, who is a member of the New York Bar and as your Honor well knows has been here many times working things out with Detective Nauwens and the government officials concerning wiretaps and what have you, he has not suggested it to me but I say if I had to do so I would do it but it seems a simpler solution to have Patrick and Leo spend Thanksgiving together if there is any question.

THE COURT: Where, at Leo's?

MR. PATRICK GUARINO: Wherever it would satisfy the Court, your Honor.

THE COURT: You are not a lawyer, Mr. Pat Guarino, but a brother and I don't know to what extent you are prepared to stretch your loyalties.

Mr. Slotnick said that if his client would take off he would report it. Would you be prepared to make a similar representation?

MR. P. GUARINO: I don't have in my mind that he would flee but if he should I would give my word that I would report it.

THE COURT: You will stay with him through Thanksgiving?

2 MR. P. GUARINO: I will take my family and go to  
3 his home and stay with them.

4 THE COURT: Mr. Feitell?

5 Are you ready to do something along this line?

6 MR. FEITELL: I have to go to Washington  
7 tomorrow.

8 THE COURT: Thanksgiving?

9 MR. FEITELL: Yes, Judge, to meet with the other  
10 attorneys who are waiting for me. I don't intend to leave  
11 until the middle of the day but throughout the entire  
12 day would be in telephone communication with Mr. Dellacava  
13 at his home. I have the number.

14 THE COURT: He has two residences. What do you  
15 refer to?

16 MR. FEITELL: In the Bronx with his wife and son.  
17 I could call through the entire day on a two-hourly  
18 basis, call in there and I am familiar with his voice and  
19 if he didn't get on the phone I would call the United States  
20 Attorney and let them know. Maybe you could express an  
21 impression with respect to what I just offered.

22 MR. STONE: Your Honor, I live in Long Island  
23 and I will be home all day. I have only known the defendant  
24 since this case but I would gladly keep in telephone  
25 communication with both Long Island residences of Mr. Guarino--



THE COURT: We have taken care of Mr. Guarino. Let me do one at a time. Thank you, Mr. Stone.

What you are saying is you would take on the responsibility for Thanksgiving and for having him turn himself in to the marshal here or at West Street?

MR. FEITELL: I won't be here Friday morning.

THE COURT: But who will be responsible for seeing that he turns himself in?

MR. FEITELL: There is another attorney. It is not that I want to shirk the responsibility but I can't tell Judge Richie --

THE COURT: I understand that. When I say take responsibility, I mean see to it that it happens. You don't feel that you are able to do that?

MR. FEITELL: I won't be here.

THE COURT: You don't think the risk is such that your enjoining upon him the crucialness of getting here --

MR. FEITELL: Yes, I haven't the slightest doubt in my mind. My relationship with Mr. Dellacava throughout this past number of months has been quite good. This man never disappointed me once. He has always been where he has to be. He has been completely direct and candid with me and I have the greatest faith in him that he will appear Friday morning. I haven't got the slightest doubt.

THE COURT: You will keep in touch with him by telephone in not more than two-hour intervals tomorrow?

MR. FEITELL: Yes, Judge.

From Washington as well.

THE COURT: You can reverse the charges.

Mr. Levenson?

MR. LEVENSON: I was going to make the same suggestion that Mr. Feitell did. I was going to suggest that I make calls at irregular intervals of not less than say six times on Thursday and if you wish to give me a number of times today and I will make a representation that in the event that he didn't answer or his whereabouts couldn't be explained, I will call back in five minutes, I will call Mr. Feffer or Mr. Feld at any number they wish to give me. I am going to be with my family on Thanksgiving and unfortunately I am not anywhere near Mr. Jermain, I live in Manhattan. But I will make that representation to see that he gets here on Friday morning.

THE COURT: All right, look, gentlemen, there is a risk in everything and I think it is minimal and courts are supposed to take cognizance of human things regardless of how people spent other Thanksgivings. All I have in mind for these four defendants who are not now incarcerated is this: I am going to allow them to proceed from here to their

homes. I am going to instruct them and I am now instructing them they are not to go anyplace else except their homes and stay there through Thanksgiving Holiday.

That with the collaboration and safeguards the various attorneys have spoken of, they are to turn themselves in to be remanded after 10 a.m. on Friday, November 23.

Where would they report to, the marshal?

MR. PEPPER: Yes, your Honor.

THE COURT: I am going to remind the defendants of something that they know about, that is there is a bail reform or bail jumping act that the failure to obey the directions I have just given you which are on the record and which I think are clear enough, may well constitute bail jumping; that bail jumping is a felony, not hard to prove, punishable by I believe, up to five years in prison.

MR. PEPPER: Yes, your Honor.

THE COURT: I suggest it because I think it is realistic that apart from any legal rules, a defendant who has a case on appeal and has started off the appeal time by jumping bail, is likely not to be an object of special sympathy in the appellate court, assuming that that might not just viciate his contentions altogether. Those are the things that I think I will order.

I think the government lawyers have been busy conferring. Is there anything you want to say?

MR. FEFFER: Yes, your Honor. We would like one further restriction placed on the conditions of bail, that agents of the drug-enforcement administration be permitted to call the residences of each of these men on an hourly basis to speak to them individually and make sure they are present.

MR. LEVENSON: If that is done, then I think there is no need for counsel to do it. I don't object, I just want to know if we can be excused from making those phone calls if the agents from the Bureau of Narcotics and Dangerous Drugs do it.

THE COURT: No, I won't release you because I am relying on you. I think that every two hours calls ought to be enough.

MR. FEFFER: Fine, your Honor.

THE COURT: The defendants, meaning Jermain and Dellacava and Guarino and Capra will understand that they are expected to respond to those telephone calls, just to indicate they are present at home.

MR. SLOTNICK: Through the 24-hour period?  
Night and day?

MR. FEFFER: I think, your Honor, starting off in

the morning and having it go through approximately to the midnight area.

Incidentally, I informed the Court that it is our intention for those portions of time any telephonic communication is not maintained, to keep these men under surveillance even if it means taking people away from Thanksgiving but we are going to do it.

THE COURT: Well, I really would not desire to be the instrument of taking anybody away from their Thanksgiving.

MR. FEFFER: Your Honor, very, very frankly, it is fine for defense counsel to sit here and assert their great faith in these defendants but we don't share their view and we think that when these people are faced with and the circumstances that I fully explained, that a day with their family is not justified and most respectfully we are going to take whatever means we can to insure that they be here Friday morning.

THE COURT: All right. I think I will leave that to you. I have disagreed a little bit with you and a lot with defense counsel and that is my job, not to be excessively nice.

Are there any questions on the conditions of the interim time before Friday?

2 MR. LEVENSON: Yes, I am not clear. When should  
3 the telephone calls begin and end. Mr. Feffer indicated  
4 that 12 o'clock. I think that is a little late. I would  
5 like to know what time you want me to start making the phone  
6 calls and when I should stop and I will do it.

7 THE COURT: Yes, I think you ought to start calling  
8 beginning about two hours from now which I think will give  
9 you enough time for Mr. Jermain to get home until you reach  
10 him and then keep calling every two hours until about  
11 11 or 12 tonight and resume in the morning about 8 or 9 a.m.  
12 and keep calling through the day and the same applies  
13 to Mr. Feitell and the conditions that I have agreed to for  
14 Mr. Guarino and Mr. Capra are different and I take it you  
15 are not asking for any modification of those except to have  
16 your people call you say.

17 MR. FEFFER: Yes, that is correct.

18 MR. MC ALEVY: Just one point. Mr. Guarino  
19 informs me that his car right now is in Westchester County  
20 and we just request that he be permitted to go to  
21 Westchester and pick up his car, he can get a ride up there,  
22 and go to Long Island. Because he has no way of getting  
23 over there, which is right near Mr. Capra's house. That  
24 is right now. He drove over and they came down together in  
25 one car.

MR. FEFFER: We have also been informed that Mr. Guarino has not been living at home for quite some time and we would like to have his present home telephone number, for each of these men.

THE COURT: I think Mr. Guarino and the other gentlemen, I take it you are leaving to go home with your families?

DEFENDANT GUARINO: I certainly am and I have been living at home but because the first time I came to Court I was late, I have been staying a little closer to the courthouse so I will be able to be here on time. I have been living at home with my wife and children.

THE COURT: Do you want the address?

MR. FEFFER: Just the telephone numbers of the four residences.

THE COURT: All right.

(Telephone numbers supplied to government counsel.)

THE COURT: Now, the order on this matter is very simple, so we don't have any ambiguity, that on the government's application, the defendants Capra, Guarino, Dellacava and Jermain may be and will be remanded to the date of sentence for reasons we have discussed, but that the time for them to surrender themselves for that remand is adjourned from now until 10 a.m. on Friday, November 23.

MR. FELD: Your Honor, I don't believe we have a date for sentence.

THE COURT: No, I was just about to look at that. We will set sentence of the defendants for December 27, at 10 a.m.

MR. BLACKSTONE: Your Honor, may I just say that the Court has already in its possession a very recent probation report on Mr. Harris and the usual lengthy delays for preparation of an appropriate report in the case of Mr. Harris, there is one current and I thought perhaps we could sentence him sooner.

THE COURT: No, I won't because although sentence is not a perfect science, one of the things it seems to me we ought to do in a case involving a group of defendants is to give some consideration to them altogether, one against the other, and I would want to consider Mr. Harris in that light, apart from what I may have read heretofore about him in a report.

MR. STONE: Your Honor, could I have any day after the 1st of the year?

I plan to go away that week.

MR. FEITELL: I do too, it is a school holiday.

MR. LEVENSON: That is the Christmas vacation.

MR. FEITELL: I made arrangements to be away with



my family.

THE COURT: The week after is January 3, 1974.  
Is that agreeable?

MR. LEVENSON: Yes, your Honor.

THE COURT: I will ask the clerk to see to it that  
the probation office has its report available for me on  
December 31.

MR. STONE: What time, your Honor.

THE COURT: 10 a.m.

THE CLERK: Room 1105.

THE COURT: Any other business?

MR. SLOTNICK: Yes, your Honor. If the  
probation report is ready on or before December 30, may I  
now make an oral application for the right to see the  
probation report?

THE COURT: I have asked for it on December 31 and  
let me just see. It appears I am going to grant your  
application and I just want to look at the logistics on this.  
December 31 is on a Tuesday and is a holiday. Will it  
serve your purpose if you see it on Wednesday the 2nd or is  
that too late?

MR. SLOTNICK: I would prefer to see it as early  
as I could.

THE COURT: Let me revise my request of the

1  
2 probation office. I want the presentence reports  
3 delivered to me on December 28 by noon, and counsel can  
4 make arrangements with my office to see the presentence  
5 reports about their respective clients on Monday, the 31st.  
6

7 I think too in the light of the nature of the case  
8 and some of its obvious problems, this would be an  
9 appropriate situation in which to request sentence  
10 recommendations from the United States Attorney and I do so  
11 request.

12 MR. FELD: We will, your Honor.

13 THE COURT: That means you too can see the pre-  
14 sentence reports sometime on the 31st.

15 Anything else?

16 MR. SLOTNICK: One other matter. In view of the  
17 terms and conditions your Honor just rendered with respect  
18 to the remand, may the defendant appear at the probation  
19 department office on Friday after they turn themselves in to  
20 the marshal's office and do so while they are in custody  
21 and not take up the time today?

22 They can forthwith repair to their homes.

23 THE COURT: Well, can probation take care of that?

24 THE CLERK: I will take the slips down and tell  
25 them they will see the defendants Friday morning.

THE COURT: All right, try to make arrangements for

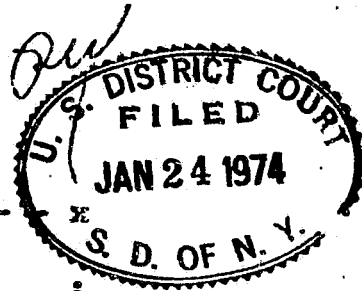
1 the marshals to hold them here for the purpose of having  
2 probation see them Friday morning.

3  
4 MR. LEVENSON: The remand is at 10 o'clock  
5 Friday morning in Room 22 downstairs, the marshal's office?

6 THE COURT: Yes.

7 Anything else, gentlemen?  
8  
9  
10  
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25

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



United States of America

v.

John Capra, Leoluca Guarino, Stephen  
Della Cava, Robert Jermain, and Alan  
Morris,

73 Cr. 460

Defendants

January 3, 1974

Before:

Hon. Marvin E. Frankel,  
District Judge.

APPEARANCES:

Paul J. Curran, Esq.,  
United States Attorney

Barry Slotnick, Esq.,  
Attorney for defendant Capra

Dennis D.S. McAlvey, Esq.,  
Attorney for defendant Guarino

Lawrence Feitell, Esq.,  
Attorney for defendant Della Cava

Leonard J. Levenson, Esq.,  
Attorney for defendant Jermain

Joseph I. Stone, Esq.,  
Attorney for defendant Morris

VOL 9

SOUTHERN DISTRICT COURT REPORTERS  
UNITED STATES COURT HOUSE  
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

1  
2 THE COURT: For sentencing, United States of  
3 America v. John Capra, Leoluca Guarino, Stephen Della  
4 Cava, Robert Jermain, and Alan Morris. Is the government  
5 ready?

6 MR. CURRAN: The government is ready.

7 MR. SLOTNICK: The defendant Capra is ready with  
8 regard to certain motions that are still pending before  
9 the court as far as I know, your Honor.

10 THE COURT: What motions are those, Mr. Slotnick?

11 MR. SLOTNICK: We have asked for a preliminary  
12 hearing due to the fact there was pre-trial publicity  
13 and in response to a communication issued by your Honor  
14 and a further communication issued by the government, and  
15 I placed before the court I think some six or seven pages  
16 in which I ultimately requested a hearing and an ultimate  
17 dismissal. I am not sure whether that's been decided at this  
18 point.

19 THE COURT: Is there anything else you have pending?  
20 You said you have certain motions pending.

21 MR. SLOTNICK: For the record I would renew my  
22 request for judgment of acquittal.

23 THE COURT: I have of course studied the problem  
24 of publicity and the submissions that were made in response  
25 to the memorandum that I published on I think November 27th.

1 I think it's already been made clear that this court does  
2 not view as trivial or insignificant the events surrounding  
3 the arrests that led to my memorandum.  
4

5 I have written down some thoughts on this subject  
6 which I will try to get typed up and published in the next  
7 day or so for the guidance, I hope, of the people in law  
8 enforcement and perhaps the rest of us, but specifically  
9 on the motion, though I do not think it is frivolous, I  
10 concluded that it must be denied, and I do deny it.

11 I believe that the impact of the unfortunate  
12 business of photography and publicity attending the arrests  
13 and particularly of the involvement of law enforcement people  
14 in assisting with those journalistic enterprises is to be  
15 regretted, but I believe that within the limits of the  
16 precedents thus far and on the record of the trial of this  
17 particular case these defendants have not been able to show  
18 grounds of why their prosecution should be vitiated because  
19 of those circumstances.

20 I think it is, nevertheless, useful for us to have  
21 made this record. One of the reasons we have appellate courts  
22 is that we get the benefit of their detachment and their  
23 somewhat greater latitude in dealing creatively with the  
24 matter of supervising law enforcement as well as supervising  
25 the lower courts, so all of that record will now be available

for scrutiny on a higher level. At this level it does not serve to defeat these convictions or to warrant the dismissal of the indictment for which Mr. Slotnick and others have moved.

I also have not overlooked the application for an evidentiary hearing. I do not believe that the papers we have are sufficient to give a full and reliable account of the extent and character of the publicity attending that so-called roundup last April.

However, in the view I take of the problem directly before me I am unable to conclude that a hearing of this nature is necessary or justified, and I do not intend, subject to being corrected later on, to hold such a hearing.

Do you want to call the rest of the defendants?

THE CLERK: Defendant Guarino ready?

MR. McALVEY: Yes.

THE CLERK: Defendant Della Cava?

MR. FEITELL: Here.

THE CLERK: Defendant Jermain?

MR. LEVENSON: Defendant Jermain is ready for sentence.

THE CLERK: Defendant Harris is not here.  
And defendant Morris?

MR. STONE: Defendant Morris is ready, your Honor.

THE COURT: All right. I am sure you are aware this in its size and in other respects is not a routine case. I am sure you are aware that I have followed the standard practice of the court and studied with care the pre-sentence reports. Counsel have been given access to those pre-sentence reports. I have read some other communications from wives of defendants. I am now prepared to hear first from counsel for the government and then counsel for the defense and then from the defendants themselves before reaching an announcement of the judgments of the court.

Mr. Curran.

MR. CURRAN: Your Honor, may I inquire if it is your Honor's pleasure to take each defendant individually or all five at once. There is a matter of second offender informations that have been filed with respect to three of the defendants, your Honor.

THE COURT: I plan to sentence them all together, but obviously I have considered them and I will consider them individually, so I think all your presentations can be made at once, if that is not disagreeable.

MR. CURRAN: Yes, sir.

Your Honor is familiar with the facts of this case and the involvement of each of the defendants in the



1  
2 distribution of heroin and cocaine on a very large if not  
3 massive scale in New York City and elsewhere in the United  
4 States. Indeed, your Honor observed I believe at the end  
5 of the trial that the evidence established that these in-  
6 dividuals have devoted their adult lives for a long time  
7 to a pattern of gross lawlessness.

8  
9 The government, your Honor, knows of no crimes  
10 more heinous than the ones these defendants have been  
11 convicted of.

12 Your Honor has requested sentence recommendations  
13 from the government as to these five defendants and the  
14 government would now turn to the defendant Capra, who has  
15 been convicted of counts 1 through 5 of the indictment.

16 This defendant is 33 years old, was married at  
17 the age of 17, and has three children. Capra told the  
18 Probation Department that his employment for the last  
19 five years consisted of loan sharking and gambling, as well  
20 as operating in 1969 and 1970 the Music Box records store  
21 at 116th Street and First Avenue in New York County.

22 Capra has been living in New Rochelle where he  
23 owns a \$100,000 home, although I understand the Internal  
24 Revenue Service has a \$634,000 tax lien on the house and  
25 Capra's other assets.

Capra's prior criminal record consists of two

bookmaking arrests in 1965, one of which resulted in acquittal. The disposition of the other is unknown, and a misdemeanor conspiracy arrest in 1970 for which he received a conditional discharge.

The facts of that case as we understand them is that he conspired to defraud a construction company by padding the payroll. The defendant as your Honor knows has been a prime mover in this conspiracy.

This defendant faces a 15-year jail sentence as a maximum and maximum fine of \$25,000 on each count, except for count 2, which calls for a maximum on which he faces a maximum jail term of 20 years and a fine of \$20,000.

It is the government's recommendation, your Honor, that this defendant be sentenced to a 15-year jail term and a \$25,000 fine on count 1, and a 15-year jail term on each of counts 2 through 5, to run concurrently with each other but consecutive to the sentence to be imposed on count 1.

THE COURT: I think you might just as well go ahead with all five defendants, Mr. Curran.

MR. CURRAN: Your Honor, the next defendant is the defendant Leo Guarino and as to this defendant I believe that a prior federal offender information has been filed with the court. The government, pursuant to law, has

received no written response contesting that information. However, there has been no, as far as I know, your Honor, admission or denial to the court of the allegation in that information.

THE COURT: You are talking about the 1959 --

MR. CURRAN: Yes, your Honor.

THE COURT: -- conspiracy involving heroin?

MR. CURRAN: Yes, your Honor.

THE COURT: All right. Go ahead.

MR. CURRAN: Did you want me to proceed, your Honor?

THE COURT: Yes.

MR. CURRAN: This defendant, your Honor, is 38 years old, married, and the father of two children. At the age of 17 he left the Marines and we understand began snorting heroin until 1958 when he took his first intravenous injection. According to him he had a \$15 a day habit until he entered the Public Health Hospital in Fort Worth, Texas, where he stayed for several days before returning to New York.

He then used narcotics until 1959, when he was arrested for violation of the federal narcotics laws and also for attempted robbery. He received a five-year concurrent jail sentence on both charges and was released in

1964.

Mr. Guarino's employment according to him from 1970 to 1973 was as a writer, producer and director of industrial films, as well as manager of show business acts. He bought a house on Long Island in 1969 for \$54,000, which house we understand is now valued at \$70,000.

His only other criminal conviction was for contempt in 1970, for which he received a sentence of 30 days in jail.

As a prior federal offender if he is found by the court to be a prior federal offender he faces a sentence on counts 1, 3, 4 and 4, a maximum sentence of 30 years in jail and a \$50,000 fine, and on count 2 a maximum sentence of 40 years in jail and a \$20,000 fine.

It is the government's recommendation, your Honor, that this defendant be sentenced to 30 years in jail on count 1 and a fine of \$50,000, and that he be sentenced to 30 years on counts 2 through 5, to run concurrently with each other and with the sentence on count 1.

THE COURT: If I add what you have said so far it is a total of 30 years for Capra and 60 for Guarino?

MR. CURRAN: No, 30 years for Guarino. 30 years on count 1, and then 30 years concurrently on each of the other counts with each other and with count 1.

1           THE COURT: In other words, you would give the  
2 same sentence to both Guarino and Capra?  
3

4           MR. CURRAN: Yes, your Honor.

5           THE COURT: The prior conviction there is not  
6 especially weighed in your judgment?  
7

8           MR. CURRAN: Well, your Honor, the defendant  
9 Capra has no prior federal narcotics conviction.

10          THE COURT: That is why I asked you in the  
11 case of Guarino.

12          MR. CURRAN: We have taken that prior conviction  
13 into consideration, your Honor, in making the recommendation.  
14 It would be the maximum jail sentence under any one of  
15 counts 1, 3, 4 or 5.

16          THE COURT: Okay.

17          MR. CURRAN: The next defendant, your Honor?

18          THE COURT: Yes.

19          MR. CURRAN: Stephen Della Cava is 48 years old,  
20 married and the father of two children. One of his children  
21 is serving a federal narcotics sentence having been convicted  
22 in June of 1972.

23          Della Cava's employment record shows his last job  
24 was this January, 1972. Since then he has been unemployed,  
25 obtaining money by, and I quote hustling around the neighbor-  
hood and gambling.

1 Della Cava received an honorable discharge  
2 from the Army and has completed two years of high school.  
3 He has an extensive criminal record and this is his third  
4 conviction of violations of the federal narcotics laws.  
5

6 In 1946 he pleaded guilty to the sale of heroin  
7 and received two years' probation. In 1958 he also pleaded  
8 guilty to sale of heroin and received three years' probation.  
9 In 1959 he was arrested for violation of the federal  
10 narcotics laws and that case was dismissed. In 1964, he  
11 was arrested for grand larceny and this case was dismissed  
12 because of "no witnesses."  
13

14 In 1965 he was arrested for forgery of a driver's  
15 license and was fined. And in 1968 he was arrested for  
16 assault and fined \$100 and 30 days in prison. In 1971  
17 he was arrested for violation of the federal narcotics laws  
18 and that cause was dismissed.  
19

20 In 1972 he was arrested for conspiracy to possess  
21 a dangerous drug and this case was also dismissed.  
22

23 Your Honor, this is this defendant's, as I said,  
24 third federal narcotics conviction. There are informations  
25 alleging the three prior convictions which have been filed  
with the court and served upon the defendant.

This defendant faces, on counts 1, 3, 4 and 5,  
as a second or subsequent federal offender, 30 years in

jail and a \$50,000 fine, and on count 2 a maximum penalty of 40 years in jail and a \$20,000 fine, with a minimum mandatory penalty on count 2 of ten years in jail.

It is the government's recommendation, your Honor, that this defendant be sentenced to 30 years in jail and a fine of \$30,000 on count 1, that he be sentenced to 30 years on each of counts 2 through 5 to run concurrently with each other and to run concurrently with the sentence on count 1.

The next defendant, your Honor?

THE COURT: Yes.

MR. CURRAN: Robert Jermain. This defendant is 38 years old, married, and divorced with three children. Since 1960 he has been living with another woman and we understand has three children by her. Mr. Jermain's father died when he was two, and his mother went to work in a garment factory and later was a housekeeper at Columbia University.

Mr. Jermain claims to have attended two years at Benjamin Franklin High School. However, there is no record of him there.

He claims to have worked in the construction company. No record was found in that company to which he referred the Probation Department.

Mr. Jermain has been living in a house he purchased for \$46,000 and added we understand a \$10,000 swimming pool.

Jermain's prior record included a drunken driving conviction in 1972 for which he was fined \$50 and had his license suspended. In 1971 he was arrested twice, once for possession of stolen property and once for violation of the federal narcotics laws. Both charges were dismissed.

This defendant, your Honor, faces on counts 1, 3, 4 and 5 fifteen years in jail and a \$25,000 fine, and on count 2, twenty years in jail and a \$20,000 fine maximums, with on count 2 a minimum mandatory sentence of five years in jail. It is the government's recommendation, your Honor, that he be sentenced to fifteen years in jail on count 1, and five years on each of counts 2 through 5, to run concurrently with each other but consecutive to the sentence on count 1.

THE COURT: Which would make a total of 20 years?

MR. CURRAN: Yes, your Honor.

Did your Honor want me to go to the final, the fifth defendant?

THE COURT: Yes.

MR. CURRAN: The fifth defendant I believe is Alan Morris. Mr. Morris is 30 years old, married in 1965,



and divorced in 1970, with one child. His parents were divorced when he was young and he lived with his grandmother and grandfather. He was taken from school in 1959. His employment consists of working for his stepfather's trucking company in Detroit, from 1961 to 1967, and as a shoe repairman in Detroit from 1957 to 1959.

Mr. Morris' criminal record goes back to the age of 12 when he was arrested for larceny and assault and received probation. A year later in 1957 he was arrested for attempted robbery and that case was dismissed.

In 1958 he was arrested for carrying a concealed weapon and again for larceny. He received probation on each case.

In 1959 he was arrested for theft of an auto and was committed to a boys school from which he escaped the same year. In 1960 he was arrested for accosting and soliciting and received a \$50 fine or 30 days. In 1963 he was arrested for conspiracy to commit larceny and was sentenced from one to two and a half years.

In 1967 and again in 1969, this defendant was arrested for carrying a concealed weapon and received fines or short imprisonment on both occasions.

In May, 1971, he was arrested for narcotics in Ohio and that case was dismissed.

1 mdh  
2 In October, 1971, the defendant was again  
3 arrested for narcotics in Ohio and received a sentence of  
4 ten to twenty years. In June and August, 1972, while he  
5 was on bail from the Ohio case, he was arrested for nar-  
6 cotics violations in Michigan, two of them I believe, your  
7 Honor. The first case was dismissed and the second case  
8 in Michigan is still pending.

9 Your Honor, this defendant also has a prior federal  
10 narcotics conviction, and the government has filed the  
11 appropriate information as to him. He therefore, because  
12 of that conviction, faces a maximum penalty on count 1,  
13 the only count in which he was named and convicted, of  
14 30 years in jail and a \$50,000 fine.

15 It is the government's recommendation, your Honor,  
16 that he be sentenced to 20 years in jail concurrent to  
17 the sentence now being served.

18 I might say, your Honor--

19 THE COURT: When you say "concurrent," you are  
20 aware, or at least my pre-sentence report indicates, that he  
21 has been sentenced in the Eastern District of Michigan  
22 to a sentence of five years, which is to commence after  
23 the service of his Ohio State sentence.

24 MR. STONE: That is my information, your Honor, and  
25 I believe that was brought out to the court on prior

occasions. I also would like to be heard on the second offender information, which I think is erroneous as a matter of law.

THE COURT: I think it is academic as a matter of reality, but I will certainly hear you. In any event, there is that consecutive federal sentence to begin after the Ohio sentence.

MR. STONE: That is correct.

THE COURT: I just wanted to understand the meaning of your recommendation. Are you suggesting that this court should recommend the state prison as a place for the service of a portion at least of this federal sentence? Is that what you are saying?

MR. CURRAN: I guess it would have to be done, if our recommendation were going to be followed by the court, yes, your Honor.

THE COURT: There are other ways to accomplish that same thing, and it is sort of technical, but I wanted to understand what you have in mind.

MR. CURRAN: It would be 20 years concurrent with the jail sentence or sentences which he now is serving or faces.

That concludes the government's statement and recommendations, your Honor, except to note that the

1  
2 recommendations as to three of the defendants were based  
3 upon the prior, at least in part upon the prior convictions  
4 to which the defendants have not -- have neither denied  
5 and they have not pleaded to them, either.

6 THE COURT: Okay..

7 I think we will proceed in the order in which  
8 the defendants appear in the indictment.

9 Mr. Slotnick.

10 MR. SLOTNICK: If I may, your Honor, Mr. Curran  
11 has used the oft-used end of trial or sentence phrase the  
12 biggest and the largest and the most which was used prior  
13 and subsequent to the jury verdict. I have heard that in  
14 this courtroom upon many occasions with regard to heroin  
15 cases. Apparently every new conspiracy indictment is the  
16 biggest and the largest and the most.

17 Today Mr. Curran says that this is the most heinous  
18 crime. I don't really think he means that. I don't  
19 think he believes that. I don't believe anybody can say  
20 this is the most heinous crime.

21 Your Honor is called upon to do a most difficult  
22 task, and I understand what the problems are. There is a  
23 style in this country with regard to people who are convicted  
24 of heroin conspiracies and it does not work well with regard  
25 to them. It is a very difficult thing. I as a lawyer and a

member of this bar with little acquaintanceship of heroin conspiracies other than what I read and see realize that, number 1, it is a different type of case, it is not a hijacking case, it is not another type of case to try.

The judges eventually get to sentence defendants more often I guess than not on these type of cases. It is a more difficult case to try. It is a difficult crime. And the judge sentences the defendant whether it be based on deterrence, punishment or rehabilitation, and usually the sentences are rather dramatic. On behalf of John Capra I have a very strange situation, because I represent a 33-year old man. Again not to be autobiographical he is younger than I am, Judge. Not only is he 33 but he's got a wife and three children and a home that is encumbered. Again, Mr. Curran asked for a \$25,000 fine. I don't think he really means that, your Honor, because you are well aware of the fact that there is a \$634,000 assessment against Mr. Capra. So where is he going to get the \$25,000?

The Probation report which I would like to get to later indicates that Mrs. Capra is about to go out into the job market. That is not a rather unique situation. That is true.

But I ask your Honor to give Mr. Capra certain credits. We have heard the debits and your Honor has heard

1 mdh  
2 the trial and your Honor has heard the testimony of my  
3 own client. I ask your Honor to consider the following  
4 things, and I have sketched them out as they have occurred  
5 chronologically, and as they are of importance to me and  
6 perhaps to your Honor.

7 The defendant was arrested at a late hour in his  
8 home in front of his wife, in front of his children, in  
9 front of their visitors. A not rather untraumatic  
10 proposition.

11 Perhaps he should have been arrested. The question  
12 comes down to the reality of the arrest. What effect has  
13 this had upon John Capra? Your Honor has read a Probation  
14 report detailing a man who is extremely close, extremely  
15 conscientious with regard to his family, a Probation report  
16 that details a love of children that might be rare in other  
17 situations.

18 So I suggest he gets a credit for this awesome  
19 thing that occurred in front of those he loved and in front  
20 of perhaps maybe the only important things in his life.

21 There is a second factor in the arrest which your  
22 Honor detailed and which came out at a hearing, the fact  
23 that an uninvited guest was in his home. Not that the agents  
24 were invited, but in came a newspaperman who reported in  
25 detail. Mr. Capra's children -- and they are not here this

1 morning, your Honor, at Mr. Capra's wishes not at mine --  
2 because he did not desire to expose them nor his wife nor  
3 his sister nor his mother nor his father to what's going on  
4 right here.  
5

6 I asked that they be here. I felt that their  
7 presence, in all due candor, might aid the court, but Mr.  
8 Capra absolutely forbid it for the simple reason that his  
9 concern outweighs his own.

10 So there was a newspaperman in his house and  
11 he reported everything that he saw, and the Capra children  
12 were told about it in school, and the Capra family found  
13 and your Honor may not know this but they found various  
14 articles on their lawn, they received various mail, they  
15 received bad publicity, they received the jeers of their  
16 neighbors, and they were generally considered rather strongly  
17 in their community.

18 As one juror said, strangely enough, who knew  
19 Mrs. Capra, "Well, there's been talk in the community."

20 It is a credit for Mr. Capra. It may be a credit  
21 arising out of a debit but it is something the court has  
22 to consider. Because whether your Honor sentenced him for  
23 deterrence, punishment, rehabilitation or for whatever reason  
24 I suggest he has to consider all of these points as to what's  
25

2 happening or has happened to this man.

3 I suggest one other thing. That certain credits  
4 arise out of certain debits promoted and prompted by the  
5 government. Publicity was an unfortunate situation. I will  
6 get to more of that later.

7 Pre-trial motions. And one of the other credits  
8 Mr. Capra gets is the fact he has lived through all this,  
9 that he has been faced with the great trauma of sitting  
10 through the pre-trial motions, where he was suddenly told  
11 by his attorney that "In order to sustain the constitutional  
12 right, John, you have got to take that witness stand and  
13 you have got to testify." Out of the blue. I wasn't pre-  
14 pared for that. He wasn't prepared for that. But after some  
15 determination and perhaps it was a wrong determination, per-  
16 haps it was a devastating term, he got up on that witness  
17 stand, your Honor, and he testified, and he told the court  
18 what I believe to be substantially, if not totally, the truth,  
19 that he was involved in a heroin conspiracy. He didn't  
20 say it proudly, he said it because that's what he had to do,  
21 and he indicated that to the court.

22 It is a strange thing. It is the first time that  
23 I know that this has happened in this courthouse. Again, it's  
24 a heroin case and I think your Honor has to give Mr. Capra  
25 some credit for that.



The Probation report indicates in a rare expression of candor "Capra admitted what he did."

Well, I think he gets a credit for that, your Honor. Because I think Mr. Capra has learned something with regard to the world we live in and with regard to the prospects that he faces, because Mr. Capra is not an untalented man. He is a rather talented individual. And we will get to that later, too. But again I dare trek off my chronology.

So Mr. Capra went through the pre-trial motions with all of the hopes and the anxieties of a defendant. There was a lot riding. With all the hopes that perhaps your Honor might grant a motion to suppress, that perhaps by some constitutional right or some twist of a word or whatever it might be this heinous indictment would be dismissed against him, using Mr. Curran's term.

But it was not. And so faced the pain and agony of trial. I think your Honor must give him a credit for that. I think most defendants should get a credit for that. Just the factor that they have to sit through a trial of this magnitude has a certain effect of deterrence, a certain effect of rehabilitation, and a certain effect of punishment. I think punishment being the greatest.

So he sat through the trial and he listened to the

1 people, and he saw what went on, and he saw certain  
2 identification of him that were made and certain that  
3 weren't. He heard a jury come in at one point and say that  
4 they couldn't come to a decision, plainly asking to go home.  
5 And it was the ultimate of pleasure that perhaps Mr. Capra  
6 was too freed for the moment because a jury had disagreed.  
7 And then there was the ultimate pain. Your Honor told them,  
8 and rightfully so, and I say it for the record, go back,  
9 there are more counts, deliberate further.  
10

11 And then we went through, the day before Thanksgiv-  
12 ing, and Mr. Capra sat and the jury came in, and I told  
13 Mr. Capra before the jury said it, for whatever it is worth,  
14 that there was no question in my mind that he had been found  
15 guilty. I told him that the night before, because of the  
16 note, the last note that came out and because of the  
17 response.  
18

19 He went home the night before, stepping back a day,  
20 in pain and agony and spent what he felt might be the last  
21 day with his family for quite a period of time. Until the  
22 jury came in and they found him guilty. And Mr. Capra  
23 deserves another credit for that, your Honor. Because when  
24 that happened, forgetting about his own personal situation,  
25 there was a certain pain in the audience, there was a  
certain feeling, there was a certain outburst. And that was

Mr. Capra's family. Not his children, just his wife.

And then there were the terrible things that were said about Mr. Capra, and then there was an argument and ultimately the remand. I think he is entitled to a credit for that. And then there was the great act of humanity that occurred from the court in which it said to Mr. Capra you can go home for Thanksgiving, and perhaps the last Thanksgiving that he would spend with his family for several years. But the court allowed him that privilege. And what happened with regard to that is past history, and terrible history. much of which your Honor doesn't know, and many credits inure to Mr. Capra's benefit as a result of that.

Well, we all know there was a great flurry of publicity. We all know, and I guess it is no great secret, that your Honor was harshly criticized in the press, on TV, on the radio. But we all know that your Honor was right. The defendants came back. They surrendered when they were supposed to. There was never a thought of flight.

What happened on that Thanksgiving day and the evening before Thanksgiving gives Mr. Capra so many credits that if it was possible for me in candor to ask your Honor to sentence him to probation, to allow him to leave his community, to just let him go away and forget about this,

1 I would ask the court, but in candor I can't ask the court  
2 to do that because I know that in candor I just can't,  
3 and for legal reasons I couldn't.

4 On Thanksgiving evening, Mr. Capra's house --  
5 and I guess he was one of the fortunates, because his house  
6 was surrounded by federal agents who were not walking around  
7 bearing shotguns -- they were in cars. They watched the  
8 car, they observed everybody, pictures were taken, headlights  
9 were on, as people left Mr. Capra's house whether willingly  
10 or unwillingly they were forced to submit to a search of  
11 their automobile. Neighbors' driveways were used,  
12 and I daresay it is my understanding without permission,  
13 where agents just parked their cars and kept their headlights  
14 on Mr. Capra's house.

15 I had breakfast the next morning with Mr. Capra,  
16 and we were followed to the courthouse. I felt as if I was  
17 under some house arrest. We were observed by agents  
18 carrying shotguns, and there was a certain strange air  
19 about the whole thing. And it was something that suddenly  
20 struck me. There had been many people represented in this  
21 courthouse and many people of worse reputation, of worse  
22 repute, and who have committed much more heinous crimes  
23 than Mr. Capra, but I guess it depended upon the climate,  
24 and this was the climate for Mr. Capra to receive the various  
25

abuses that I have dictated.

So I ask that he get credits for all of these. Your Honor's order, indicating that there was some question about the prejudicial publicity, I ask that he get credit for that, because as he sat in West Street and he studied and he read and saw the memorandum of the court, in his mind there was this simple, simple rationale of everybody that sits in this courtroom, that maybe the judge will now take a position and throw my case out, maybe I can go back home to my family. That is not wishful thinking, Judge. That is agony. That is masochism and that is sadism and all terrible things combined into one. A man sitting in West Street. And by the way, as I indicated to your Honor, a man sitting in West Street with a principal accuser, Earl Simms sitting in his cell. Not only sitting in his cell but as his bunk mate, and I ask that he get a credit for that. Because that to me was totally unbearable, and I don't know whether it was done purposely or it was not done purposely, but I think it was bad choosing and I think somewhere along the line that it shouldn't have been done. I think it was wrong.

Mr. Capra had some bronchial illness, and he asked that people be moved out of his cell, and Mr. Simms was placed right next door, and when Mr. Capra was moved Mr. Simms

1 was moved with him. And by the time I got to writing the  
2 letter to the court, by the time I found out about it,  
3 Mr. Simms was gone.  
4

5 There are other things in this case in which  
6 I think all the defendants deserve a credit. I have just  
7 recently, within the past day, found out one of the chief  
8 government witnesses was committing acts of extortion  
9 against other people who were prospective defendants,  
10 shaking them down, in the vernacular, asking for ten and  
11 twenty thousand dollars so as not to put other people  
12 in this case while emboweled in the bosom of the government.  
13 And I think a credit should be given to the defendant for  
14 that, and I think perhaps that might lie or be the basis  
15 of a future motion.  
16

17 I further have been informed that one of the  
18 chief government witnesses has admitted lies, and admitted  
19 pursuit, and admitted all sorts of terrible things, and  
20 again this comes not from investigation but comes from  
21 a tape recording, an extortionate conversation with an  
22 individual who was a defendant and who couldn't possibly  
23 be a prospective defendant.  
24

25 I think all of these things credit the defendants.  
Again, your Honor says this is an unusual case. I guess we  
are all here to seek justice.

1 I ask your Honor, in making my recommendation,  
2 to be as lenient as he possibly can, and I think that  
3 the defendant merits that through his personal history.  
4 And I say that seriously, and in candor. And again I know  
5 your Honor will send Mr. Capra to jail, and I am not asking  
6 for probation, nor can I possibly, either legally or  
7 otherwise. I ask you to be fundamentally fair and just  
8 because of his background, because of his home life, because  
9 of his skills, because of the financial problems that have  
10 been occasioned to all around him, and because of all the  
11 credits that he is entitled to, and because these credits  
12 might inure to the benefit of justice.  
13

14 I have indicated that there are certain things  
15 that have to be cleared up in the Probation report, and I  
16 would like to now.

17 Mr. Capra was employed in the construction industry  
18 until 1969. He earned between seventeen and twenty  
19 thousand dollars a year in the industry. He was a foreman  
20 in the industry. His last employment was with I believe  
21 Chivoni Bros. Mr. Capra had been consistently employed  
22 in the construction industry and is a very talented and  
23 skillful man. I have seen not only the product of his own  
24 handiwork but I have heard about the employment. As a  
25 matter of fact I have in my office today, and I haven't

1 brought it to court, I think it premature, but an offer  
2 of employment from someone in the construction industry  
3 saying "I will take John Capra today to be employed; I  
4 will accept him as my employee."  
5

6 I think it is premature, and I think at this time  
7 it is not appropriate, but I indicate that to the court.  
8 This is a very talented man. This is a talented man who has  
9 for the first time in his life at age 33 been caught to  
10 face up to a very serious proposition.  
11

12 The Probation report indicates that Mr. Capra  
13 was part of a conspiracy to pad a payroll with regard to  
14 Underhill Construction Company. Mr. Capra pleaded guilty  
15 and received a conditional discharge. Not a probation, not  
16 a suspended sentence, a conditional discharge.

17 It appears that between 1969 and 1970, during  
18 that period of time, Mr. Capra received pay checks for  
19 full days when he perhaps did not work a full day. And this  
20 was uncovered as a result of some investigation into Co-op  
21 City. It also appears there were many others in the con-  
22 struction business who were involved in this situation.

23 Again, I don't think it was a very serious  
24 proposition at that time. He received a conditional discharge.

25 Your Honor has a complete history of his family,  
his father who preceded him in the construction business, his



1 mother who is a housewife, his sister, his brother, who  
2 you know something about, his married life, his children.  
3

4 The Probation Department indicates, in quotes,  
5 "Mr. Capra is well adjusted socially and also in his  
6 emotional makeup. He gets along well with people."  
7

8 And most especially there is much information  
9 about his love of his family, especially his children.

10 It also indicates the assets that Mr. Capra  
11 has, and his minus net worth, as I call it, because ultimately  
12 when it is all said and done \$634,000 liened upon by the  
13 government, and that's indicated. And that is not a myth,  
14 that is not a shadow, but that is a realty.

15 What your Honor shall do with Mr. Capra will  
16 well affect others. Mrs. Capra will -- and she is attempting  
17 to find a job -- and as the Probation indicated her  
18 entrance into the job market is a rather strange experience  
19 for her. She has a home that she cannot possibly pay for  
20 or keep, a home which she cannot possibly sell because  
21 it is liened. She has three daughters who are of school age  
22 and cannot help her financially.

23 I think an indication of Mr. Capra's great  
24 financial wealth was an indication of the fact that he was  
25 unable during the course of the trial to purchase even  
substantial portions of the transcript.

1           Mr. Capra is in serious problems both before  
2 this court and financially. His family is. We ask your  
3 Honor to consider all of that because we have before  
4 us a living, breathing, 33-year old man, and that is  
5 very young to sit before this court in this situation.  
6

7           In reading what other people have to say about  
8 sentences -- and I have started reading a lot what other  
9 people have to say about sentences -- an area which your  
10 Honor is well cited, but I find the Appellate Division of  
11 New York said something that I think is particularly germane  
12 and I would like to read it to the court. I am sure the  
13 court has read it before.  
14

15           "The prime aim of socialized justice is the  
16 dispassionate and conscientious evaluation of the unique  
17 aspects of the convicted offenders total personality, his  
18 intelligence, his character structure, his demonstrated  
19 ability to conform, without the disruptive and destructive  
20 effects of imprisonment."  
21

22           There is no question in my mind that there  
23 cannot be anything more disruptive or destructive to  
24 John Capra than prison. There is no question in my mind  
25 but that your Honor will send him there. The question in  
my mind is how long.

I ask your Honor, as I have begun, to be as

lenient as possible. His Probation report is not really a bad one. It indicates that there are others that must be considered. It indicates that Mr. Capra considers others.

Based upon that, and based upon the last awesome credit that he is to receive, I ask your Honor to be lenient, and that is the last awesome credit is the removal of Mr. Capra's family, which perhaps is the worst possible blow that any man could suffer of Mr. Capra's ilk and I ask your Honor to consider that.

I know your Honor will be fair and lenient.

Thank you.

THE COURT: Mr. McAlvey.

MR. McALVEY: If the Court please, first of all, your Honor, with respect to the information that I received in my office about two weeks ago I do have an affidavit in response to the information that charges Mr. Guarino as being a second offender.

The reason I am so tardy in bringing this to the attention of the court, and to the attention of the United States Attorney, is because it was only signed today by Mr. Guarino. I had difficulty locating his former attorney, a Mr. Buchser. If your Honor will recall, I sent a letter to the court asking that today, January 3rd,

1 the sentence date for Mr. Guarino, he stayed until such  
2 time as I received the minutes from the original entry  
3 of the plea, which was back in August of 1959.  
4

5 So at this time, your Honor -- and I would have  
6 done this prior to the court commencing today but by the  
7 time I got finished with Mr. Guarino in the courtroom your  
8 Honor was on the bench -- so at this time I will serve Mr.  
9 Curran, your Honor, with a copy of the affidavit, and I  
10 certainly have the original for the court.  
11

12 In brief, your Honor, Mr. Guarino -- and I can  
13 only go by what Mr. Guarino tells me, of course -- is that  
14 back in August of 1959 while he was charged with a nar-  
15 cotics violation he entered a plea of guilty before Judge  
16 MacMahon at the time he was being represented by an unknown  
17 member of the Legal Aid Society.

18 After the plea was entered before Judge MacMahon  
19 someone, not the attorney that was representing him,  
20 Mr. Guarino, but someone else told--

21 THE COURT: Let me interrupt you, because I think  
22 there are two short things to say about this. First, it  
23 is obvious that I am not going to set aside a duly entered  
24 judgment of conviction on the records of this court which  
25 nobody disputes. There are procedures under Section 2255  
and elsewhere for raising questions of that kind. I am not

going to conduct a 2255 proceeding here.

Second, I will tell you for your guidance, and Mr. Guarino's, that my inclination has been to treat him and Mr. Capra as being closely similar in point of culpability from the viewpoint of sentencing, and I came here disposed to think that Mr. Guarino's sentence ought to be somewhat more severe than Mr. Capra's on that account.

Having heard the government's submissions on this subject, and being of the view that I ought to weigh very heavily any tendency in the direction of lenity by the government, I believe that will be washed out of this picture, nevertheless, the record should be clear that I will sentence Mr. Guarino on the assumption that he does have this prior conviction in this court which has not been duly set aside in the course of the law, and insofar as anybody wants to make something of that at some future time it will be open, but not today.

MR. McALVEY: Very well, your Honor.

THE COURT: Did you want to say something, Mr. Curran?

MR. CURRAN: Well, your Honor, I guess it is appropriate to raise it now. Under the statute, Section 851 of Title 21, as I understand it, this paper, this affidavit just served upon me now, constitutes, I believe,

1           mdh  
2           though I have read it very quickly, in effect a denial  
3           by the defendant Guarino that he is a second offender,  
4           and it seems to me, and I may be wrong, that under the  
5           statute he must before a judgment, your Honor, either admit  
6           or deny the prior conviction, and if he denies the prior  
7           conviction before your Honor enters judgment then I believe  
8           a hearing is required.

9           THE COURT: I am not going to construe it that  
10          way because -- what are you reading from, 851?

11          MR. CURRAN: 851, your Honor, of Title 21, sir.

12          THE COURT: Hand it up, please.

13          (Pause)

14          MR. CURRAN: The most relevant subparagraphs  
15          would be small b and small c in parenthesis, on the second  
16          page of the statute.

17          (Pause)

18          THE COURT: I can think of few things that would  
19          waste the court's time more than that. I am in light of  
20          the government's overall recommendation, and the total  
21          picture of this case -- and I have in mind specifically  
22          the government's effective recommendation of a sentence  
23          no different for Guarino from that for Capra -- in light  
24          of all that I am simply going to disregard that prior  
25          conviction, and I so order.

1  
2 Okay.

3 Go ahead, Mr. McAlvey.

4 MR. McALVEY: If the Court please, I was  
5 tendered a copy of the Probation report concerning Mr.  
6 Guarino, and I certainly made my notes, I went over the  
7 quite thorough report, I might add, and I have spoken  
8 to Mr. Guarino concerning that report. There is only one  
9 thing I would like to clear up about it, your Honor.

10 I believe Mr. Curran this morning stated that  
11 in 1959 Mr. Guarino was sentenced on a narcotics violation  
12 by the federal court and a state violation, and Mr. Curran  
13 stated that these sentences ran concurrently. That is not  
14 so, your Honor. A mere reading of the Probation report  
15 would show the court that it was in fact a consecutive  
16 sentence that he received back in 1959. And he served,  
17 your Honor, from 10-29-59 up until February 16th of 1964.  
18

19 I just wanted to clear that matter up.

20 THE COURT: Okay.

21 MR. McALVEY: If the Court please, Mr. Guarino  
22 was stated in the Probation report as being a -- and I  
23 don't know if this is a quote or not -- a director of this  
24 narcotics business that was carried on. Certainly I  
25 won't burden the court by the testimony in the pre-trial  
motions that were made. The court certainly is and should be

familiar with both sides of the case, the government and the defense side at this time.

I would just like to say, your Honor, that I felt the entire government's case was based on this Mr. Ramos from Ohio, the man that got 20 years in Ohio, that made a deal with the United States Government, and it just arouses my ire to such an extent that I know that my taxes are going to support this Mr. Ramos who was convicted four times on narcotics violations, and when I find out that one of the United States Attorneys wanted the State of Ohio, and got clemency for this individual who took the stand and for four to five days told a story that was in part true but in part so fabricated it became incredible. If the court will remember, the man was very distinct about what he remembered concerning the exact times set forth in the indictment.

THE COURT: Mr. McAlvey, I wish you would talk about sentencing. I sat at this trial, and the one question I don't have in my mind at this moment is the question of guilt or innocence. I have had few cases where I have felt less reservation about the absolute clarity of the demonstration of guilt.

So why use your time on that?

MR. McALVEY: All right, your Honor, I won't comment.



1  
2 on whether Mr. Guarino is guilty or innocent. He was  
3 found guilty by a jury. Certainly I believe there will be  
4 an appeal filed in this case. In fact, one of the applica-  
5 tions I will make today, your Honor, I understand certainly  
6 that the court has to send Mr. Guarino to jail.

7 I would ask, your Honor, that since I cannot  
8 handle this appeal, your Honor, my calendar certainly is--  
9 I am a trial lawyer and this appeal will take many, many  
10 months of preparation, and the new attorney when he comes  
11 into the case, he will certainly have to sit down, your  
12 Honor, not only with me but with Mr. Guarino to go over  
13 these many, many wiretaps to prepare the appeal, and  
14 I would ask, your Honor, that whatever sentence the court  
15 gives Mr. Guarino that he be allowed to remain in the  
16 Southern District in confinement pending the appeal so  
17 the court will enable myself and the attorney that will  
18 take the appeal and Mr. Guarino to confer. I don't know  
19 how I will be able to do it, your Honor, if he is sent  
20 to a place of confinement say in excess of a hundred miles  
21 from the city. It would be virtually impossible.

22 You will recall the many pre-trial motions  
23 we had in this case.

24 THE COURT: I don't run West Street. I would  
25 certainly recommend to the Bureau that his confinement be

1  
2 at West Street, pending appeal, if that is physically  
3 possible.

4 MR. McALVEY: Thank you, your Honor.

5 Judge, with respect to the sentence itself, my  
6 conversations with Mr. Guarino and the Probation report  
7 match up pretty well. We know that Mr. Guarino as a youth  
8 had some -- when he was in the Marine Corps he got involved  
9 with heroin, and as a result became an addict and led to  
10 his arrest back in '59.

11 I believe, your Honor, that the first arrest  
12 was for selling a negligible amount of drugs in the amount  
13 of seven or eight hundred dollars. That's where he pleaded  
14 guilty to and that is of course concerning the affidavit  
15 that was filed today.

16 Pending that, your Honor, he pleaded guilty  
17 to a robbery of a delicatessen in which he received nothing.  
18 He was apprehended shortly thereafter. And those were  
19 the two times this man has been in trouble.

20 Actually, Judge, it arises out of the one specific  
21 instance that the man was an addict at the time. He did his  
22 time, he did almost six years, both in state and federal  
23 confinement.

24 When he got out, Judge, outside of these  
25 negligible citations in the report I believe he was

1  
2 arrested in Las Vegas one time for failing to give a good  
3 account, and that he refused to testify before a grand jury  
4 in the Bronx or Queens. That's been his only involvement.

5 True, there is a -- I believe in 1972 he was  
6 arrested for conspiracy to sell narcotics, but your Honor  
7 will recall from the testimony that that was part and parcel  
8 of the trial that was conducted before your Honor, to wit,  
9 I believe it was the February 2nd occurrence that took place  
10 as far as Mr. Guarino was concerned right down by Rockefeller  
11 Center, and certainly that is part and parcel of this entire  
12 trial and I don't think that should be taken into considera-  
13 tion when your Honor imposes sentence with regard to Mr.  
14 Guardino.

15 Judge, as you know, he was born and raised up  
16 in East Harlem, which is a very, very tough neighborhood,  
17 as most of these men were. He grew up in the streets,  
18 and with respect to his mother and father, of course dead  
19 now, with respect to his brother and his -- his two brothers  
20 and his two sisters, they have never been in any trouble  
21 whatsoever, and in fact Pat, who sat through this entire  
22 trial, is a brother lawyer, a member of the bar of the State  
23 of New York.

24  
25 There is no question about the fact that Leo has  
been in trouble since 1959. There is no question that he has

1       mdh  
2       been convicted of this indictment that he stands before  
3       the court at this time.

4               He was described, your Honor, as being the director  
5       of a large organization, and yet we find by reading the  
6       Probation report that the \$22,000 that was used as a down  
7       payment on his house came from the proceeds of the sale of  
8       his deceased mother and father's home. This big, bigshot,  
9       this director of this large scale, as the government tells  
10      us, narcotics operation, Judge, if he made the money that  
11      the government has said he has, where is it? Does he just have  
12      it hidden somewhere in the ground?

13             I attempted, Judge, through this trial to show  
14      that this man did work, he was gainfully employed, and the  
15      Probation report reflects the fact that he did manage that  
16      popular sextet, the Joe Flutis sextet. He was involved  
17      in show business to a certain extent with respect to filming  
18      industrial films and screen writing.

19             There is no question in my mind about that, your  
20      Honor, that he was involved to that extent.

21             I would ask this, Judge. The man is married,  
22      and he has been married for quite some time, he has two  
23      children. The report reflected something that Leo never told  
24      me, about the little child down in Central America. I learned  
25      that for the first time when I read this report.

Now, certainly, Judge, that shows that the man does have some type of compassion. I certainly think if I was in his position, and I said this to Leo, "Tell me what good things I can speak about," he didn't even mention that to me, Judge, he just let it pass.

He is in the streets, Judge. He is not well educated yet he is a very smart man. He is a product of society. And now he stands before the court to be sentenced for drugs, for selling drugs. If it wasn't for drugs, Judge, he would never be in court here today, and now the government says "Send this 38-year old man to prison for 30 years and fine him more money than he has in equity in the house that his wife and two children reside in because this is the most heinous crime of all, drugs." Well, is it, Judge? Is Leo Guarino the most heinous crime that ever came before your Honor? Does Mr. Curran really believe that? I don't know, Judge.

I was a prosecutor for almost five years, Judge, I tried a lot of drug cases. It is true drugs are very bad. But should this 38-year old man be sentenced, knowing that he won't get out of jail for another 25, 26 years? Is that going to end everything? Is that going to deter him from doing it again? I don't know.

1  
2 I wouldn't be in your shoes for a million dollars,  
3 your Honor. What a terrible responsibility. I just ask,  
4 Judge, that you be fair, that you be fair to the United  
5 States Government and you be fair to Leo Guarino. He will  
6 take whatever sentence you give him, Judge. I just ask you  
7 to be fair.

8 Thank you.

9 THE COURT: Mr. Feitell.

10 MR. FEITELL: First, your Honor, I would like  
11 to renew the motion for a judgment of acquittal which was  
12 made in court during the case. Upon rendition of the  
13 verdict I think your Honor permitted us to reserve motions  
14 to the day of sentence. So, to complete the record, I renew  
15 that motion and all other motions for mistrial made during  
16 the trial.

17 THE COURT: The rulings heretofore made are  
18 repeated and the motions are denied.

19 MR. FEITELL: I didn't have an opportunity to  
20 address myself to your Honor's comments respecting the  
21 publicity features of this case, and I would beg your  
22 Honor's leave to just make very brief comment so that the  
23 record is rounded out at this time.

24 THE COURT: No, I would just as soon you didn't,  
25 Mr. Feitell. You were given ample opportunity. I received

1 from your office a memorandum, a rather unusual one, I  
2 must say, in my experience on either side of the bench,  
3 which said "Dictated but not read."  
4

5 I have read the other things, and I would like  
6 you now to proceed to sentencing.

7 MR. FEITELL: Not usual in my practice, Judge.  
8 When I don't have an opportunity to actually see the dictated  
9 product.

10 Mr. Curran addressed himself to certain previous  
11 alleged convictions sustained by Mr. Della Cava. Before  
12 he made his opening remarks I was careful enough to check  
13 the informations that Mr. Swanciger has, and the dates set  
14 forth in the informations -- there are three of them he has --  
15 are not consistent with what Mr. Curran said.

16 My reading of the informations indicates that  
17 there are two informations relating to October 30, 1946,  
18 if I am not mistaken.

19 THE COURT: I only see one. There are two indictments.  
20 But in any event I can't think of anything less important  
21 than whether it was two indictments or one. It was a prose-  
22 cution for the sale of heroin, and Judge Rifkind placed the  
23 defendant on probation. Is that basically correct?

24 MR. FEITELL: That is not my problem. My problem  
25 was Mr. Curran's statement put the two indictments in

two different years so as to give an indication there was a continuity of conduct over a long period of time.

THE COURT: Was there not another prosecution before Judge Ryan in which Judge Ryan gave three years' probation in 1951?

MR. FEITELL: No, I don't know about that, Judge. In fact, I brought that up to Mr. Della Cava and he is not familiar with that, and I daresay he has no knowledge of that. Mr. Curran's remarks on the 1951 incident indicate there was a dismissal there. So I think the state of the record is pretty confused.

THE COURT: I see on the pre-sentence report a dismissal in 1959 during trial by Judge Dawson in another case, but I have seen no denials of two narcotics convictions, one in 1946 before Judge Rifkind and another in 1951 before Judge Sylvester Ryan, evidently arising out of events in 1948.

MR. FEITELL: Maybe with your Honor's more particularized statement that you have just made, if you will bear with me for a moment I would like to have the defendant again refresh his recollection as to that so I can clear this record up.

THE COURT: Sure.

(Pause)



1 mdh  
2 MR. FEITELL: We have experienced some re-  
3 freshment.

4 THE COURT: Is what I have said, which I have  
5 merely read from the pre-sentence report, which was of  
6 course available to you -- is that substantially accurate?

7 MR. FEITELL: With respect to your comments  
8 about Judge Ryan, that was the only incident that I  
9 addressed to Mr. Della Cava's attention and he is now re-  
10 freshed as to that and he has explained to me what was  
11 involved in connection with that.

12 THE COURT: Okay. Actually, I haven't had an  
13 opportunity to look at this Probation report and I am not  
14 pleading excusal on that basis, although the report  
15 apparently was made available only within the last few days  
16 while I was not here. Of course I could have been here  
17 except that I had plans to be elsewhere, and had the sentence  
18 been put over a few days I would have had an opportunity  
19 to go into it in the detail I would like to, so that by  
20 my silence today there may be things that are in that  
21 Probation report which your Honor is willing to accept which  
22 had I had a true opportunity to bring them to the defendant's  
23 attention might have been the cause of some discussion.

24 However, I am not asking your Honor to defer  
25 these proceedings any length of time whatsoever. I think I

1           mdh  
2           have a fair and fit remedy if with your Honor's indulgence  
3           you will permit me to look at the Probation report after  
4           sentence is imposed, and certainly within a period of  
5           120 days, because if there is an application that is going  
6           to be made for sentence reduction I think it would be  
7           fit and appropriate to point out in such an application  
8           that there might be some errors in that Probation report.

9           THE COURT: Yes, I will permit you to have that  
10          opportunity. You can arrange that with the Probation office.

11          MR. FEITELL: Thank you, your Honor.

12          What has been said regarding Mr. Della Cava's  
13          personal history is substantially correct. He is 48 years  
14          of age. He is an honorably discharged veteran, having  
15          served in World War II.

16          One partial omission I think relates to the fact  
17          that he spent 20 years in gainful employment in the local  
18          Plasterers Union where he worked for a variety of contractors  
19          doing substantial manual labor, and labor related to  
20          that particular trade or expertise.

21          In 1968 he advises me he suffered an injury and  
22          he hurt his leg, and as a result of that he had to be  
23          hospitalized. He tells me that his in-step was broken,  
24          and he underwent surgery, and there was removal of bone  
25          fragments, and that he was never able to rehabilitate himself

1 mdh  
2 with respect to that injury, and was unable to go back  
3 to work in that particular track.

4 With respect to his family, comment was made  
5 by Mr. Curran regarding a son who suffered some unfortunate  
6 criminal involvement, and the injection of a comment re-  
7 lating to Mr. Della Cava's son in these proceedings may  
8 leave in your Honor's mind suggestion that call for rebuttal.  
9 We nearly had such a rebuttal during the course of this  
10 trial. I think that those -- the incident related to that  
11 tape recording that is still alive in your Honor's memory,  
12 where apparently Mr. Della Cava's young son had gone out  
13 and --

14 THE COURT: Yes, I remember it.

15 MR. FEITELL: You remember that. So that when  
16 your Honor hears from Mr. Curran that Mr. Della Cava was  
17 indicted at or about the same time, and tells you also  
18 that the case against him was dismissed, I think he means  
19 dismissed in the grand jury or at least that there was  
20 never any indictment. The grand jurors knew well what  
21 had happened and heard the tape recordings and knew full  
22 well that in that situation what Mr. Della Cava had done  
23 was to go out and to meet these people who were agents  
24 of the government who were seeking to entrap him and to  
25 have him procure narcotics for them. I think that that

1 was probably found by the members of the grand jury to  
2 be a pretty repelling incident, and it must have been  
3 pretty clear in the minds of the grand jurors based upon  
4 Mr. Della Cava's own words which they could hear on the  
5 taped recordings that were made during those incidents,  
6 that the furthest thing from his mind was to allow his son  
7 into any participation in drug trade, and that he took  
8 strong and effective remedies against his son.  
9

10 It is perhaps unfair for the government to  
11 suggest that Mr. Della Cava has promoted the sale of  
12 narcotics by training his son in this so-called criminal  
13 trade. The facts known to your Honor, even at this  
14 stage, should be sufficiently clear to eradicate any doubt  
15 whatsoever on that score, so that the reference to the  
16 1971 case is misplaced here in connection with his day of  
17 sentence, and also this passing swipe taken at Mr. Della  
18 Cava through reference to his son.  
19

20 THE COURT: Why don't you get on, Mr. Feitell?  
21 I am not going to put any weight on the business regarding  
22 his son. He is surely in enough trouble quite on his own  
23 without attributing anything whatsoever to matters involving  
24 his son, and I will make no such attribution.  
25

MR. FEITELL: For a large part of his adult  
life Mr. Della Cava has been gainfully employed. He has a

1  
2 wife who lives here in the city, a 16-year old daughter,  
3 presently attends school, a son to which some reference  
4 was made before, who has been sporadically employed but  
5 I am not sure whether he is employed now though the Pro-  
6 bation report might indicate that, this young man having  
7 some experience in the building trade himself.

8 I am advised that in the light of what's likely  
9 to happen here today that the financial impact upon his  
10 family is going to be devastating. Certainly -- and  
11 I don't want to dwell on this unnecessarily -- your Honor  
12 has some view of the relationships that developed, that the  
13 trial facts developed here, and I am not going to get  
14 into anything further with respect to financial postures  
15 of the individuals except that I would say to your Honor  
16 that in dealing with this particular defendant you are  
17 dealing with an individual who has slipped more than once.  
18 Probably the last occurrence which brought him into this  
19 courtroom in connection with this conspiracy was the out-  
20 growth of the accident that he suffered in 1968, which  
21 prevented him from going back to work, to be gainfully em-  
22 ployed in the manner in which he was truly used to.

23 And so it was that he became involved in some kind  
24 of a substitute means of employment, which was this passing  
25 interest in the operation of a bar in which he became the

ostensible manager and bartender. I think there can be very little dispute factually regarding that phase of the case and what was brought out, namely, that he did take an active interest in the operation of the business while that business, unfortunately, apparently did become the situs for certain criminal activities, if we accept the proof tendered at the trial. Still, nonetheless, it was an operating business and it consumed a large amount of the defendant's time. And in his own way it was an attempt with his meager talents and his limited capacities to project himself in some kind of a productive and an economically resourceful way.

Of course it took a twist that was unfortunate for himself, but I think the attitude on the part of this defendant respecting the value of work peaks out through his involvement in that particular employment and all the other employments that he has had over the years.

I don't want to get into a discussion about mental gifts or intellectual capacities. I think those will probably be developed through the writer of the Probation report. I don't think this gentleman, with all due respect to him, who is a loving father, and is very devoted to his children and is concerned with what the future holds in store not only for himself but for his wife and family, has had some

difficulties in carrying on a successful and productive economic life.

I feel certain that your Honor in meting out sentence today will likewise be fair in rendering a judgment which places this particular defendant in the correct context and in the correct relational position.

I think the other aspects of his so-called criminal record while they are not particularly commendable nonetheless do not indicate a single-minded devotion to criminali and wrongdoing.

I would like to fall back to the position that Mr. Della Cava, while he has engaged in activities which the court will probably find to be, and the mass of humanity would find to be, reprehensible, has nonetheless devoted a very substantial portion of his life to good and productive acts going as far back as his own military service and the 20 years he did spend in a quite productive trade until he was injured.

And with that I would ask your Honor to be as lenient in the circumstances as possible.

THE COURT: Let's take five minutes.

(Recess)

THE COURT: Mr. Blackstone, I don't understand. The clerk tells me you want to put something on the record

1 why your client is not here.

2  
3 MR. BLACKSTONE: Yes. Many of the counsel  
4 have asked why the defendant Harris has not been produced  
5 today, and to squelch any possible rumor, I would like  
6 it to be known that he is not here today because he has  
7 not been produced by the government, that shortly after  
8 this trial was concluded he was shipped to Detroit for  
9 prosecution on another case, on which he was acquitted,  
10 and he simply was not transported here today for sentence.

11 That is all, your Honor.

12 THE COURT: That is my understanding, too.  
13 Is that yours, Mr. Curran?

14 MR. CURRAN: Yes, your Honor. Mr. Feld tells me  
15 that Detroit -- or Michigan, I believe -- was informed  
16 he should be brought back here for the sentence, and it  
17 wasn't done, and now your Honor has set sentence I believe  
18 for the 11th of this month.

19 THE COURT: I don't know when it was rescheduled,  
20 but, Mr. Blackstone, I finally understand quite properly  
21 wanted the record to show the reason for his absence,  
22 and it does now show.

23 All right, Mr. Levenson.

24 MR. LEVENSON: Thank you, your Honor.

25 With respect to the sentence of my client, Bobby



Jermain, I would like to see if we can work out some sort of meaningful guidelines with respect to a meaningful sentence.

Mr. Curran has quite properly pointed out that Mr. Jermain's involvement in the crime here was probably less intensive than some of the other defendants, and, consequently, any ordered sense of justice should take that into account.

Absent a more definite guideline as to how to sentence an individual I am going to rely to some degree on your Honor's views in many of your writings and take, for instance, the crime itself, which we all agree is quite serious.

I would disagree with Mr. Curran with respect to being the most heinous type of crime, but it is quite serious and society must be protected with respect to that. I disagree very strongly with Mr. Curran's rather Draconian suggestion as to sentence. I think the court itself on many occasions has indicated that as a rule sentences in the United States are much too long and much longer than most other civilized countries. I think on many occasions you have indicated that Sweden and other countries than the United States, it is rare when a sentence of more than five or ten years is imposed.

1  
2 THE COURT: Is it true but we do have to face  
3 the fact my commission is granted in the United States.

4 MR. LEVENSON: I agree with that.

5 THE COURT: And I have to follow the law under  
6 which I am supposed to do this job. I think you should  
7 have that in mind. I don't think judges have to be  
8 absolutely muzzled, but it should be clear that extra-  
9 judicial expressions of views can't govern what a judge  
10 is supposed to do if he undertakes, as I surely will, to  
11 obey the law.

12 MR. LEVENSON: Your Honor, I am not suggesting  
13 you apply Swedish law. I agree.

14 Taking into consideration the fact this is a  
15 rather serious crime, we have other factors which would  
16 affect the sentence here. My client, for instance, other  
17 than his lawless conduct with respect to -- oh, I'd say  
18 the past three or four years since his involvement with  
19 this drug ring, if you would -- has led a life which has  
20 not been anti-social. He has been arrested on a number  
21 of occasions, but has never been convicted.

22 His first arrest involved a possession of  
23 stolen car back in April of 1971, and that case was  
24 dismissed.

25 There was an involvement with Mr. Ramos, where Mr.

Ramos asked him if he could find a buyer for a car and it turns out the car was stolen, and he was arrested and as I say the case was dismissed.

His second offense was this Cleveland arrest in 1971. I think the court is familiar with it, it came out during trial. There also the offense was dismissed.

He was convicted of driving while intoxicated and he was given a \$50 fine, and I think the sentence was suspended for sixty days.

Other than that, he has had no previous involvement with the law. As I say, he is 38 years old now. Before 1971 -- or I should say before 1970, if we take the evidence that came out at the trial, he was working, he was working in the construction business. He did own a fish market and he was working in a fish market, although perhaps Mr. Curran might suggest that was just a front. Nevertheless, he did receive income from that.

Mr. Jermain is not an alienated individual from society. He supports a wife -- I say a wife, he has been living with her for a number of years, I don't believe he was ever married to her, but they are as married as could be. I mean they have three children together.

He has been supporting her and the three children, and a granddaughter of a previous marriage who is now living

with him.

He is a responsible individual, and if nothing else he has created for these four individuals, these four children, a stable and secure environment. This must be considered pro-social behavior.

The fact that he has gone, shall I say, 34 years without committing lawless activity, or at least it hasn't been proven he has committed any lawless activity, speaks well of his basic instincts, I would say.

I can suggest that the enormous profits that come from this trade in narcotics is quite tempting for an individual who grew up in poverty, and of course I am not suggesting that it is justified, there are millions of people who don't engage in this who are just as poor. I am saying Mr. Jermain is a human being with human weaknesses.

Now, if we were to consider sentencing Mr. Jermain to 20 years, for all practical purposes his life would be finished. And to the extent that destroying a human life or placing him in a position of total isolation from society destroys what is good in an individual to that extent punishment is wrong.

I believe that Mr. Jermain, if he could ever change his present scale of values, could be a very positive force in society. He has much good about him. There is

1 a loyalty to him which I believe is misdirected at the  
2 present time, but I think it could be changed. He has  
3 been offered freedom from prosecution in this case by the  
4 government, plus the payment of his outstanding mortgage  
5 of his house if he would have cooperated with the government.  
6

7 Now, he didn't do that. I say perhaps this is  
8 misdirected in his loyalties.

9 Nevertheless, I think a certain period of in-  
10 carceration might be able to change this set of values,  
11 and once it is changed I think that loyalty could be very  
12 positively used.

13 He is energetic. He is intelligent, although  
14 he doesn't have much formal education. I think he could  
15 have done very well in business, if he had been directed  
16 in that area. I might say I think everyone here probably  
17 could.

18 There comes a point where caging an individual  
19 just becomes self-destructive. If he cannot be changed  
20 within a period of, say, 8 to 10 years, well, he is never  
21 going to be changed and we might as well execute him.

22 I think if he should revert back to his anti-  
23 social behavior after getting out of jail after, say,  
24 seven or eight years, or ten years, there is a period of  
25 probation. He could be sent back to jail again. There is

1 mdh  
2 a hold that the court has on him. 20 years to me is a  
3 lifetime, and I would be very reluctant to sentence anyone,  
4 except the most incorrigible individual, to a period of  
5 imprisonment for such period of time.

6 Therefore, your Honor -- oh, let me just comment  
7 briefly about the Probation report.

8 The Probation report was short, skimpily, and I  
9 believe unfair.

10 The Probation officer did not speak to Mr.  
11 Jermain's wife, did not speak to his mother or his sister.  
12 The Probation report indicates he is extremely tense with  
13 considerable underlying feelings of hostility.

14 From what I understand of the Probation interview  
15 it was Mr. Cosmodes, the Probation officer, that was  
16 hostile. He was hostile because I directed Mr. Jermain  
17 not to make any statements with respect to the underlying  
18 facts of the case. When I did that Mr. Cosmides became  
19 hostile.

20 THE COURT: That is not going to advance you very  
21 much. You know I sit here a lot, I have had a lot of  
22 dealings with Mr. Cosmides, and if I have to try out a  
23 question of belligerency as between him and Mr. Jermain--

24 MR. LEVENSON: You would believe Mr. --

25 THE COURT: Mr. Jermain might lose. And I don't

really want to try that out.

MR. LEVENSON: All right, I will go on to another matter. There is no mention here of Mr. Jermain's activities with the fish market. I can only assume that Mr. Cosmides overlooked that.

At any rate, your Honor, I don't think there is much I can add to this. I just ask that the court exercise--

THE COURT: You say there is no reference to the fish market?

MR. LEVENSON: Unless I overlooked it, your Honor.

THE COURT: You overlooked it.

MR. LEVENSON: I'm sorry, my mistake.

THE COURT: Okay.

MR. LEVENSON: I ask that the court exercise whatever leniency it feels compatible with justice and render that sentence which would serve those ends of justice.

Thank you, your Honor.

THE COURT: Thank you, Mr. Levenson.

Mr. Stone.

MR. STONE: Your Honor, you have sat through lengthy statements by many counsel. I think that the Probation report on behalf of Mr. Morris is accurate in most respects. I will take issue with the government in their filing of a second offender information as pertains

1 to Mr. Morris and their recommendation which is based  
2 in part upon the second offender information.  
3

4 The second offender information brings to your  
5 attention a conviction in August of 1973, and we are not  
6 disputing the conviction but it is my understanding that  
7 Congress enacted a law that permits the court to adjudicate  
8 a person a second offender based upon the events for  
9 which he stands convicted now of having taken place after  
10 the second offender information occurred.

11 THE COURT: Let's understand again in the whole  
12 picture we are dealing with something so miniscule that  
13 we ought not to use your valuable time on it. I would just  
14 disregard that second offender information, although  
15 the conviction and sentence in Michigan you certainly  
16 don't want to overlook in sentencing Mr. Morris.

17 MR. STONE: No, sir.

18 MR. CURRAN: Your Honor, may I interrupt?

19 THE COURT: Yes.

20 MR. CURRAN: I want to make one point. The  
21 statute specifically provides if a defendant wants to  
22 contest he should contest in writing. Except for the  
23 affidavit served this morning by Mr. Guarino at the time  
24 of his counsel's addressing the court there has been no  
25 contest in writing by the other two defendants involved with



1 mdh  
2 prior convictions and I believe, your Honor, under the  
3 statute in that posture your Honor might well be justified  
4 in considering the prior convictions as having been admitted.

5 THE COURT: I am sure I might, but I again can  
6 think of few matters that ought less to engage the time  
7 of the court than that in a case of this nature with a man  
8 who has a record of the kind Mr. Morris brings to court  
9 with him.

10 MR. STONE: Your Honor, I would also call to your  
11 attention, or ask you not to consider the juvenile offenses.  
12 I think that most courts in passing sentence upon an adult  
13 of Mr. Morris' age and of his background would not consider  
14 his juvenile record. I think, however, that that may  
15 have been considered in the Michigan court, for which he  
16 has been sentenced both by state and federal authorities,  
17 and by the Ohio courts.

18 THE COURT: I will be perfectly clear with you,  
19 Mr. Stone, as I think sentencing judges ought to try to  
20 be whenever possible. I will not disregard the record of  
21 Mr. Morris' juvenile problems because I think that they are  
22 essential to an understanding of the life of a very troubled  
23 and very difficult man.

24 If that is error, it should be spread upon the  
25 record, and I have spread it upon the record. I think those

1       mdh  
2       could not be overlooked any more than I would overlook  
3       a long career as a choir boy, and so I will consider them,  
4       and I have considered them, in pondering the case of  
5       Mr. Morris.

6               MR. STONE:   Your Honor, I would ask you then  
7       to take into complete consideration the fact that this  
8       conviction is based a great deal upon the seizure of  
9       six or seven kilos of narcotics in Toledo for which he  
10      stands convicted and sentenced and is serving that ten to  
11      twenty years. I think the government was candid in at  
12      least recommending a concurrent term because they fully  
13      realize that when the technical issue of double jeopardy  
14      applies the issue of double punishment certainly applies,  
15      and that Mr. Morris can contest as a legal issue the element  
16      of double jeopardy. I ask the court to consider and not  
17      impose a double punishment situation.

18             I think that the maximum term for which he should  
19      be liable for punishment in this court would be a maximum  
20      of 15 years based upon the disregarding of the second  
21      offender information under the first count.

22             I certainly feel that based on his background  
23      and the prior convictions the sentence he is now serving  
24      that the court follow the recommendation to give a con-  
25      current sentence an institution that you may designate, but

that your maximum period of time imposed be considerably less than the 15 years sentence that the maximum will allow you to give Mr. Morris. I think a concurrent sentence here would reflect the prior conviction, the similar event situation, as well as the Michigan conviction. There was testimony in this trial of certain elements that took place at the airport in Detroit, and that is the basis of the Michigan conviction in the Eastern District of Michigan for which he stands committed to a term of five years to run consecutively to the 20-year or ten to twenty-year Ohio sentence.

I think this man, his youth is before him in prison, and I ask that you at least give him the opportunity to serve concurrent time at a lesser degree than some of the other jurisdictions have imposed.

THE COURT: All right.

The defendants, I am sure, are aware but in any event I remind them that each of them at this time before I impose sentence has a right to speak for himself and to say whatever things he thinks may be useful to him or helpful in the pronouncement of a just sentence. So I will hear each of the defendants who may have anything to say. Mr. Capra?

DEFENDANT CAPRA: No, your Honor, I have nothing

1  
2 to say.

3 THE COURT: Mr. Guarino?

4 MR. GUARINO: Well, your Honor, I would just  
5 like to explain to the court that 30 years goes into 60  
6 twice, and genetically no male member of my family has  
7 lived over the age of 60.

8 Now the social conditions that exist in this  
9 world existed when I was born, and I am sure they will  
10 continue afterwards. This world has been here for a  
11 million years and will be here for a million years after  
12 I am gone, and I just can't understand the mentality of  
13 the United States Government when they blandly ask for  
14 a 30-year commitment for an individual. They virtually  
15 close people out. That's all I have to say. I would like  
16 to thank your Honor for attempting to give us a fair trial.

17 THE COURT: Mr. Della Cava?

18 MR. CURRAN: Your Honor, if I may, before Mr.  
19 Della Cava, your Honor has ruled, I believe, with respect  
20 to Mr. Morris and Mr. Guarino on their prior convictions.  
21 Mr. Della Cava that is three, your Honor. The informations  
22 have been filed, and I don't believe he has affirmed or  
23 denied those. However, he has not negated in writing in  
24 informations, and I submit to your Honor that your Honor  
25 may properly consider those prior convictions in sentencing

Mr. Della Cava.

THE COURT: I thought my conversation with Mr. Feitell made clear that there was no disagreement about the existence of the 1946 judgment by Judge Rifkind, and the 1951 judgment by Judge Ryan.

I am not clear that in the end they will make a notable difference in the sentence but I believe they are proper factors to be taken into account.

MR. CURRAN: The reason I made the statement was as I read Section 851 of Title 21 in subparagraph B the defendant must affirm the prior convictions.

THE COURT: Must affirm the prior convictions?

MR. CURRAN: Or deny. But if your Honor is going to consider them there is a provision, I believe, in Section B it says that <sup>if</sup> the information is filed the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information.

THE COURT: And you want me to do that?

MR. CURRAN: I think your Honor should, yes.

THE COURT: All right. Mr. Della Cava, you were talking to Mr. Feitell when I was discussing with him the conviction indicated in these records in the government's

information before Judge Rifkind in 1946. Did that occur?

DEFENDANT DELLA CAVA: 1946 that occurred, sir.

THE COURT: And the conviction by Judge Ryan in 1951, did that occur?

DEFENDANT DELLA CAVA: I am not too clear on it, your Honor. When I was sentenced at that time I think it was '51 -- is that what we are talking about, sir?

THE COURT: Yes.

DEFENDANT DELLA CAVA: Judge Ryan instead of having court, he says you take probation and we'll forget it. That's the way I went on with that. So I don't know whether this was for a third term or whatever you're trying to say. I don't understand.

THE COURT: Mr. Curran, since this is your special province, what do you want to do about that?

MR. CURRAN: Your Honor, there has been an admission as to the 1946 conviction, and I think the record is sufficiently clear for your Honor to consider this man as a prior federal offender, so I would propose to do nothing further about it if that is agreeable to your Honor.

THE COURT: It is perfectly agreeable to me as I don't think it matters.

Now that you are up, Mr. Della Cava, unfortunately you have been in that position before so you know that this

1 is a time when you may speak for yourself and I will  
2 hear you.

3  
4 DEFENDANT DELLA CAVA: I have nothing to say,  
5 your Honor. Thank you for trying to run a fair trial for  
6 us.

7 THE COURT: Mr. Jermain?

8 DEFENDANT JERMAIN: Well, your Honor, I am 38  
9 years old, and as Mr. Curran says if you give me 20  
10 years there are two infants in my house, and with a sentence  
11 like that it would basically ruin my life and possibly  
12 theirs. And that's about it.

13 THE COURT: Mr. Morris.

14 DEFENDANT MORRIS: Your Honor, I am not really  
15 clear on the matter of the second offender, you know.  
16 I believe I understand what you said with regard to it.  
17 But I would like to say that during the time that I  
18 received the sentence in Michigan it was after I had  
19 been indicted here, and that case went back to 1970 with  
20 one of the other co-conspirators in the case, Earl Simms,  
21 and I wasn't took to trial on the case for 31 months,  
22 and when the second offender issue came down in this  
23 court I think during the pre-trial there was some conver-  
24 sation about it then, you know, and I think it was  
25 introduced to your Honor.

1  
2 THE COURT: I am not going to consider this  
3 as a second offender case for present purposes. Is  
4 there anything else that you would want to talk about?

5 DEFENDANT MORRIS: I just want you to take  
6 into consideration I am in this case, but I have been  
7 through this case twice prior to this, you know, in other  
8 stages of the same case, and I would just like for you to  
9 take that into consideration.

10 THE COURT: I will take it into consideration,  
11 Mr. Morris, but I am going to consider the evidence that  
12 apart from the specific things that you were  
13 convicted for in Ohio, and in Michigan, and having in mind  
14 that they cover the same kinds of conduct and even the  
15 same sort of course of conduct the evidence before me shows  
16 that you were functioning as a regular dealer in narcotics  
17 as part of the conspiracy involved in this case.

18 I have also taken into account your management  
19 of yourself through this proceeding as well as before,  
20 and it is my conclusion that some additional penalty should  
21 be imposed in this case on you, and I am going to follow  
22 that judgment, but I will not fail to realize that those  
23 other sentences have to be taken into account and  
24 weighed with this one.

25 DEFENDANT MORRIS: Thank you.



1           THE COURT: We have all been together for a  
2 long time. I think the defendants are not interested  
3 in listening to long speeches by sentencing judges.  
4 At the same time I have expressed this many times. I think  
5 the defendants themselves and the lawyers and perhaps in a  
6 case like this the public has a right to some intimations  
7 of what the judge has thought and what he has tried to  
8 weigh in making this decision as to sentence.  
9

10           There has been a lot of debate about whether  
11 the crime or crimes involved in this case were heinous.  
12 For myself, I resolved that question by answering very  
13 affirmatively. Whether they are the most heinous or the  
14 least heinous is a subject I don't want to pursue. These  
15 are atrocious crimes in which a group of defendants,  
16 all of whom were competent to earn their livings in some  
17 lawful way, chose to make long term, deliberate organized  
18 purposeful commitments to a kind of crime motivated  
19 exclusively by inordinate greed and having as its foundation  
20 the misery and the suffering and general injury prevalent  
21 in the community because of the problem of narcotics  
22 about which nobody needs me to make a speech.

23           We were all fully aware of this on the day  
24 the jury returned its verdicts. I indicated at that time  
25 that it seemed overwhelmingly probable that this would be

1 a case for substantial sentences and today I am going  
2 to impose substantial sentences. There has been reference  
3 I think by Mr. Slotnick, it doesn't matter by whom, to the  
4 fact that four of these defendants were permitted to go  
5 home for Thanksgiving day when it happened coincidentally  
6 that the verdicts were returned the day before. I would  
7 not mention this subject except for its mention in argument  
8 and the fact that I have had a letter from Mrs. Jermain  
9 expressing concern, I think it is fair to say, that  
10 because of certain publicity the court might react by  
11 making a show of fierceness or otherwise demonstrating  
12 that we are not softheaded by such matters.  
13

14 I will simply say that I think it regrettable  
15 that the people in law enforcements, of whom I think there  
16 are many in this room, felt obliged to invite photographers  
17 to be with them while they valiantly guarded these de-  
18 fendants on Thanksgiving day, that the risk was not com-  
19 mensurate with the dramatic performance staged by the  
20 members of the law enforcement operations, but that one of  
21 the advantages that the founding fathers worked out by  
22 appointing judges with life tenure, if not with high  
23 salaries, was that it is not necessary to be especially  
24 upset by the displeasure of law enforcement people on  
25 occasions like this. For whatever it is worth, because I

do recognize the edginess of people, and the significant concern at such a time brings to families, I want to give assurance as nearly as I can explore the workings of my own mind nobody is going to spend any extra time in prison for having spent last Thanksgiving day at home. The fact remains that the sentences will be long ones.

Congress has decreed up to 15 years or 20 years, as the case may be, on each of the counts involved in this case. That is an expression of a view about heinousness that I cannot permit myself to disregard in passing sentence. I have said that the conduct in this case was among the most grievous examples of this kind of violation that could come to the attention of the court. It was a large scale operation conducted, as I have said, strictly for profit. At some point in perhaps a debatable tactic one of the prosecution witnesses, Ramos, I believe it was, was questioned about whether he had ever given thought to the use of heroin by young people. The record is clear that the defendants before me seemed never to have expended any time giving thought to that terrible problem in our society. So I have considered all of that with respect to all of these defendants, none of whom are driven by their own addiction or drug habits, which sometimes leads judges to feel some urge toward leniency

on that score.

I have also felt it relevant, because the accident of the judge ought not determine the sentence in an arbitrary way, to study some of the sentences of people in comparable cases in this courthouse and in others, and I will state that I believe that a sense of the pattern of such sentences as nearly as I can perceive one has played a part, though I can't say exactly what part, in the judgment made about the sentences to be pronounced today.

I have certainly tried within the limits of the possibility of such an enterprise to take into account the total and varying personalities of each of these defendants following the thought that I think again was expressed by Mr. Slotnick. I think it is fair to say that judges are not brilliantly equipped to make judgments about personalities, and that we ought not to delude ourselves or others with the belief that we make a very refined and discriminating analyses of personality and character, but I will also say in our own defense that we try hard to do so and to get some understanding of people.

I have tried in this case. In the end, though, given the nature of the crime and the nature of all the people with all their differences it has seemed to me that

perhaps probably the overriding concern in parceling out these severe sentences has been the nature and degree of the participation of each defendant in the crimes for which they have been convicted. That doesn't mean whatever a lawyer may wish to make of it that I have considered that to the exclusion of everything else, but I do want to make this record show what I am trying to do so that if I am doing something erroneous somebody will be able to see it, and I do report to you that I think the single most significant factor for me in the end has been a weighing of the criminal conduct as I came to understand it on the record of this trial.

I will sentence the defendants in the order in which they have spoken and in which they were indicted. Mr. Capra, on count 1, is sentenced to 15 years' imprisonment.

On count 2 he is sentenced to three years' imprisonment, to run consecutively to the period of imprisonment on count 1.

On counts 3, 4 and 5, 15 years each, to run concurrently with the sentence on count 1 and the sentence on count 2.

That adds up to 18 years.

In addition --

1                   mdh  
2                   MR. CURRAN: Your Honor, I believe that  
3 count 2 is a so-called mandatory minimum or old law  
4 count.

5                   THE COURT: Then let's change it.

6                   MR. CURRAN: Which provides from 5 to 20, sir.

7                   THE COURT: Thank you for your help to me  
8 and to Mr. Capra. The purpose is clear enough but we  
9 better try to do it legally. I will change the sentence  
10 to count 2. Like 1, 4 and 5 it will be a 15-year  
11 sentence, and all of those will run concurrently -- no,  
12 counts 1, 2, 3 and 5, concurrent sentences of 15 years.  
13 On count 4, a sentence of three years to run consecutively  
14 following the 15-year sentences on the other four counts.  
15 Does that seem legal, Mr. Curran?

16                   MR. CURRAN: Yes, your Honor.

17                   THE COURT: And, again, my thanks to you for  
18 your assistance to me in this and other things, Mr. Curran.  
19 Let me say it was meant the result would be a total of 18  
20 years.

21                   On each of the counts under the new law, those  
22 are counts 1, 4 and 5, a special parole term of six years  
23 will be imposed on Mr. Capra.

24                   On each -- on count 1, Mr. Capra will be fined  
25 \$25,000. On count 2, he will be fined \$20,000.

I say a word about that. I know about the tax lien. I know also about testimony at the trial, and I don't have any idea about the extent or nature of Mr. Capra's assets. One of the functions of sentence is to express the community's condemnation of the crime and where the crime seems motivated strictly by greed, as I have said, a fine is at least a reflection of that community attitude. When or how it can be collected is not a matter that the court needs to address itself at this time.

The court in the light of discussions that we have had will impose the same sentence on Mr. Guarino. On count 1, 2, 3 and 5, 15 years. On count 4, three years. The sentence on the first four counts to be concurrent; the three-year sentence on count 4 to be consecutive to the other four.

Again, a six-year special parole term. Again, on count 1 a fine of \$25,000. On count 2 a fine of \$20,000.

Mr. Della Cava comes here as at least a second or third offender. His participation in this crime was less major than that of the first two. He is older. Taking all things into account, Mr. Della Cava is sentenced to a term of 15 years on each of the three counts on which he was convicted, those terms to run concurrently.

On counts 1, 4 and 5, special parole term of six

years.

Mr. Jermain is probably a somewhat lesser participant, though it is a little difficult to weigh Della Cava's role as against the non-entrepreneurial role of Mr. Della Cava, but considering Mr. Jermain's personal situation, his lack of any prior criminal record, and taking into account on the other hand that he, too, seems to have had a deep commitment to this criminal enterprise, the court will on each of the five counts on which he was convicted impose a term of imprisonment of twelve years to run concurrently, and again in his case a special parole term of six years.

Mr. Morris is in trouble in many courts. I have spoken to him briefly. I have spoken to his attorney about the very troublesome biography that this pre-sentence report recounts. I think any judge who sentenced Mr. Morris with a notation that he was planning for Mr. Morris' rehabilitation would be kidding himself. If Mr. Morris gets rehabilitated it is not going to be because of what the courts took but because of what he may some day decide to do. But in any event, considering his role and the things we have talked about I am going to impose on the single count of this indictment on which he was convicted a sentence of 8 years to run concurrently with the sentence



imposed in the Eastern District of Michigan on August 15, 1973, in a case which in my pre-sentence report has docket number 45688, and I assume that there is no other such sentence so that that will sufficiently identify it.

There was a request by Mr. McAlvey for incarceration here pending appeal. Do any others join in such a request?

MR. SLOINICK: I join in that request.

MR. STONE: We all do.

MR. LEVENSON: I join in it.

MR. FEITELL: And I.

THE COURT: I will request that the judgments show the recommendation of the court that the defendant in each instance be confined in the Federal House of Detention here pending appeal if the over-taxed facilities at that house make that possible.

All of the defendants in this case have been energetically and devotedly represented. I think the requirement of the rule is probably academic in this case, but I do remind each defendant now that having been sentenced after conviction following trial in a case in which you pled not guilty each of you has a right of appeal, and in the case of any defendant who is without funds to prosecute an appeal if you let the clerk know

1  
2 yourdesire to file an appeal he will see that a notice  
3 is filed for you or better still in addition let me direct  
4 each counsel to ascertain in the case of each defendant  
5 his wishes in that regard and make certain that a notice is  
6 filed for any defendant who wishes to appeal.

7 I think all of you know, finally, that under the  
8 rules of the Court of Appeals trial counsel are not relieved  
9 pending appeal until and unless relieved by the Court of  
10 Appeals.

11 Are there any other things to be considered  
12 at this time?

13 MR. LEVENSON: Your Honor, with respect to  
14 assigned counsel, can we assume that the court is now  
15 reassigning assigned counsel or continuing counsel for  
16 the purpose of appeal?

17 THE COURT: As I understand the rule of the  
18 Court of Appeals, in the jurisdiction in which this lies,  
19 you remain counsel on appeal until or unless you are relieved.  
20

21 MR. SLOINICK: I have two questions of the court.  
22 Your Honor is well aware there are subdivisions of sentencing.  
23 One is the so-called A sentence and the other is the B.  
24 Would your Honor be sentencing the defendant under the  
25 A section of the sentence?

THE COURT: If I would I would say so. I do not

1 believe that any defendant ought to be considered for  
2 parole before the one-third of sentence that normally  
3 applies, and so I am not making any provision for any differ-  
4 ent arrangement.  
5

6 MR. SLOTNICK: May I also reserve my right  
7 to make a full bail application on papers before your Honor?  
8

9 THE COURT: Yes. I suspect that since we have  
10 had lengthy discussions on that subject the likelihood  
11 is that you might find a fresh audience more receptive  
12 but if you wish to apply and if it is in time I will  
13 consider it.

14 MR. STONE: In behalf of the defendant Morris  
15 I respectfully request that the clerk file a notice of  
16 appeal on his behalf. He indicates that he desires to  
17 prosecute the appeal in the Second Circuit Court of Appeals.  
18 I was an assigned counsel. I will continue my obligations  
19 until relieved by the Court of Appeals if the notice of  
20 appeal is filed.

21 THE COURT: Will you take care of that?

22 THE CLERK: I think he should.

23 THE COURT: Will you do that, Mr. Stone, please?  
24 File a notice of appeal for Mr. Morris.

25 MR. STONE: Yes, I will, your Honor.

THE COURT: Thank you.

1  
2 MR. STONE: The only problem I think you would  
3 have to endorse it, no payment of fees.

4 THE COURT: I have a pen and everything. I  
5 can do that.

6 Is there anything else, gentlemen?

7 Allright, let's take a short recess.  
8  
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25

I (We) hereby certify that the foregoing  
is a true and accurate transcript, to the best  
of my (our) skill and ability, from my (our)  
stenographic notes of this proceeding.

*Murray Deutsch*  
Official Court Reporter  
U. S. District Court

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NEW YORK, TUES

## City-U.S. Raids Net 65 Reputed Narcotics Dealers

City and Federal officials announced yesterday the indictment of 86 reputed drug dealers and said 65 of them had already been arrested—61 in the metropolitan area and four in Detroit.

The officials said the raids, in which city policemen and Federal agents operated as teams, were the most damaging ever to the narcotics traffic here.

Investigation of the rings, which allegedly could handle more than 220 pounds of heroin a week, began more than a year ago.

Details of the indictments and arrests are on Page 37. A step-by-step account of the work by policemen and Federal agents follows:

### 'Historic' Mission a Guarded Secret

By JOHN CORRY

It began about 11 P.M. on Friday, with the police detectives and Federal narcotics agents waiting to be briefed, and a sense of exhilaration rising among the men they worked for.

"Did you think this night would ever come?" Deputy Inspector Daniel Leonard said to Deputy Commissioner William P. McCarthy, and Mr. McCarthy nodded and said that he felt pretty good, too.

This was at the Federal



Photographs for The New York Times by DON HOGAN CHARLES and LARRY MORRIS  
U.S. and city raiders with Mrs. Cecile Sperling, 66, whose son, Herbert, also was seized

was to be a big raid on Chinatown.

He said that the agents and to help," Mr. Pohl said. "They policemen would operate in have carbines, shotguns, sledge

Bureau of Narcotics and Dangerous Drugs at 57th Street and 11th Avenue. It is an office building, and it has an automobile showroom on the ground floor and the bureau on the 18th and 19th floors.

"We cannot have a leak. We cannot have a leak now," Deputy Commissioner McCarthy said to the people in the conference room. "This is a historic night. So I want to wish each of you good luck."

The agents and detectives were waiting in a conference room on the 18th floor. They had not been told yet why they were there, and indeed the Police Department had even planted a report among its own men, saying that there

teams of four, that they would wear yellow armbands, that they would all have code names, and that he himself would be the chief of operations, working out of a command center on the 19th floor.

Then he said that only seven persons would be admitted to the command center that prisoners would be taken into the building on the freight elevator, and that, of course, there might be some danger.

"We have teams standing by

hammers, bolt cutters and quite a few other pieces of equipment that might interest you."

Everyone laughed, and Mr. Pahl went on to say that one of the narcotics dealers was thought to have a machine gun.

The agents and detectives looked at one another and murmured.

"Who?" a man in the back of the room finally said.

Mr. Pahl said the man with the machine gun would be identified.



An augmented raiding party, with rifles and equipment for breaking down doors, besieges a Bronx apartment

# 'Historic' City-Federal Narcotics Roundup

## Was Guarded Secret

Continued From Page 1, Col. 4

tified to the team assigned to arrest him.

Each team was to get a folder with information about their man. Some of the folders would have red markings and some would have blue. The red markings would identify the suspects who were wanted most urgently.

When the briefing was over, the agents and detectives picked up their folders. Mr. Pohl and a few other men went to the command center. There were placards on the wall with the suspects' names on them. They were really score-cards. During the long night ahead a detective would mark "in custody" next to a great many of the names.

### Folders Studied

The agents and detectives, meanwhile, were studying their folders. In many cases they were meeting one another for the first time.

Detectives Bruce Kennedy and Francis T. Payne, for instance, were sitting in an office with two agents. The man they were to go after lived on the Upper West Side, but he was known to be in Orangeburg, N. Y., often. No one, however, knew where he might be that night.

"Do we have anything on him? He sniffs coke, doesn't he?" one of the agents said.

"And his wife carries a gun, too, right?" the other agent said.

Detective Payne said yes, and he said that he had even been in the man's apartment

when he had been arrested before.

"He had a lock way up here," Detective Payne said, reaching above his head, "so that it couldn't be picked."

In the street, meanwhile, Lieut. Gabriel Stefania and Detectives Michael Giovannello and Anthony Gustitus were putting three shotguns, a carbine and ceramic bullet-proof vests into the trunk of their car, through, but inside the apart-

### Suspects Trailed

The three men knew a great deal about some of the suspects. Indeed, they had been following some for 18 months, since the case had begun. Once, knowing that narcotics dealer was to have a birthday party in a bar, Detective Giovannello had wandered in before him. He had even sung "Happy Birthday."

This night Lieutenant Stefania and the two detectives were to supervise some of the other teams. Three of the narcotics dealer, they had heard, were in Bachelors 111 on Lexington Avenue. They went there first.

Outside Bachelors 111, Lieutenant Stefania talked to an agent. Yes, the agent said, the three were inside; so was a detective, watching them. Other agents and detectives were up and down Lexington Avenue.

### 125th Street Bar Invaded

Still, they had to wait. If they arrested the three inside Bachelors 111, an accomplice might get to a phone and warn the other suspects. They would have to get them when they were alone.

Uptown, in the 32d Precinct, agents and detectives were

gathered for a raid on the Purple Manor bar on 125th Street. Some of the agents were arguing about different breeds of dogs. A police sergeant looked on benignly.

"Why do these guys all have Fu Manchu mustaches?" he said to no one in particular.

Shortly before 3 A.M., the agents and detectives moved in on the Purple Manor. There were 25 of them, and they were led by Capt. Jeremiah O'Connor, the commanding officer of the Sixth Narcotics District. They drove to the side of the street opposite the Purple Manor and then ran over in a herd, their shotguns pointed at the sky.

Captain O'Connor was in first. A man at the bar uttered a single epithet, and then all the agents and detectives were inside.

A man walked out of the toilet. He was stopped and searched. He had a pistol. In the toilet there were packets of cocaine.

"Now, officer," the man said, "I don't deny having the gun, but I don't know nothing about the stuff inside."

In the dim light of the Purple Manor, under paper streamers hung from the ceiling, the agents moved about, searching. On the floor, under a chair, they found another gun.

### 'A Small Problem'

At 4 A.M., Lieutenant Stefania got a radio message.

"304 East 42d Street," it said. "A small problem, but it requires assistance."

One of the men who had been in Bachelors 111 had just been arrested. He had been picked up on the street, along with a young woman. Now she was sitting in the back seat of an agent's car on East 42d Street, sobbing uncontrollably, saying that it was all a great mistake.

The young woman and the man she had been arrested with were taken to 57th Street and 11th Avenue. The man was taken upstairs first, and as





The New York Times

A policeman goes through a door into the Purple Manor, the Bronx, after breaking out panel in raid Sunday night.

Side Highway at speeds up to 70 miles an hour.

The suspect was supposed to be in an apartment at Concourse Village West, not far from the Grand Concourse. The captain, the sergeant and the agent got there, found the floor and walked slowly down the hallway.

went to something called the Piggy Back Social Club at 167th Street and Jerome Avenue. It was, he said, worth at least a try.

By 6 A.M., the agents and detectives were outside the club. It was on the second floor of a small building, and the double door was



the first time.

Detectives Bruce Kennedy and Francis T. Payne, for instance, were sitting in an office with two agents. The man they were to go after lived on the Upper West Side, but he was known to be in Orangeburg, N. Y., often. No one, however, knew where he might be that night.

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The young woman and the man she had been arrested with were taken to 57th Street and 11th Avenue. The man was taken upstairs first, and as dawn began to lighten the sky, the young woman stood outside the building in a circle of agents and detectives.

Detective Olga Ford, celebrated in the Police Department for breaking the murder case of Patrolmen Joseph A. Piagenti and Waverly M. Jones, approached her.

"Look," she said, "you know this is a bad crowd you're running around with."

The young woman pressed against a wall, sobbing.

Upstairs, Mr. Pohl and Deputy Inspector Leonard were in the command center, looking at a television screen that showed the prisoners as they were brought in. By 5 A.M., they had seen 11 of them.

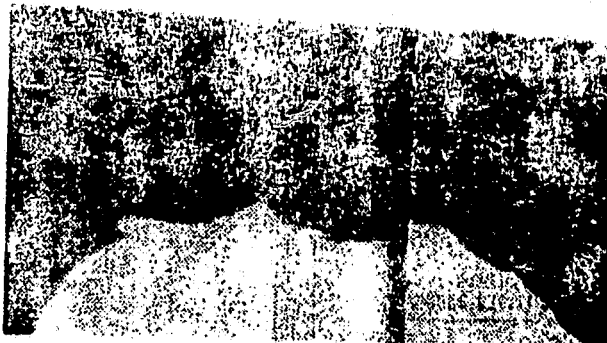
The team that was following the man with the machine gun, meanwhile, was reasonably sure that he was now in his apartment in the Bronx. The team wanted to go after him. The command center decided to send up more men.

A squad of agents and detectives with shotguns, sledge hammers and crowbars, left for the Bronx. They were followed by a captain, a sergeant and an agent, who drove up the West



The New York Times

One of a group of agents entering a building at Jerome Avenue and 167th Street, in the Bronx, that houses the Piggy Back Social Club. Inside, they found the patrons watching TV screens. The raiders' progress up the stairs to the club has been shown on the TV.



The New York Times

A policeman goes through a door into the Purple Manor, the Bronx, after breaking out panel in raid Sunday night.

Side Highway at speeds up to 70 miles an hour.

The suspect was supposed to be in an apartment at Concourse Village West, not far from the Grand Concourse. The captain, the sergeant and the agent got there, found the floor and walked slowly down the hallway.

The agents and detectives with the shotguns and sledge hammers were waiting, hidden in a stairwell. The captain, sergeant and agent joined them, and then the sergeant walked up to the door of the apartment.

"There's a bird going chirp, chirp," he said. He shrugged.

#### Door Broken Open

The captain decided to knock. He did it twice, and when there was no answer from behind the door, he called for a sledge hammer.

A detective began swinging it against the door and from somewhere within the apartment a woman called out, "What's that?"

The door fell open. The agents and detectives panned through but inside the apartment there were only the woman and her baby daughter. The woman said she hadn't seen the man since the night before. The doors to a balcony, however, were open. The agents and detectives speculated that he might have got out that way.

One of the policemen recalled that the man sometimes

went to something called the Piggy Back Social Club at 167th Street and Jerome Avenue. It was, he said, worth at least a try.

By 6 A.M., the agents and detectives were outside the club. It was on the second floor of a small building, and the downstairs door was locked. They pounded on the door, a man let them in, and everyone ran up the stairs.

#### No Suspect

Upstairs, however, there was another door. For minutes, the officers pounded on it. They shouted. They looked for another way in. Finally they found a man with keys.

Reluctantly he opened the door. There, inside the Piggy Back Social Club, 30 people sat at a bar. At the end of the bar were two television screens. They showed the stairway and the landing. While the agents and detectives were trying to get in, the people at the bar had been watching.

The man they had sought was not there, but underneath a chair in what passed for a lounge, there was a gun, and underneath a woman's foot was a bottle of cocaine.

It was 6:35 A.M. now, and the agents and detectives were driving back to West 57th Street. Mr. Pohl's voice came over the radio.

"We're progressing very well and all the reds are now in custody," he said.

"Good," the captain said.

## **City Police and U.S. Agents Cooperate in Big Sweep**

The arrests of 65 suspected narcotics dealers were announced yesterday by city and Federal officials, who said they were among the most important drug arrests in the city's history.

"Nothing has ever been done before that would so diminish the supply of drugs in New York," Deputy Commissioner William P. McCarthy said.

The arrests which were made over the weekend by teams of policemen and Federal narcotics agents, grew out of nine Federal indictments that were handed up here last Friday and one that was handed up in New Jersey.

The indictments involved 83 persons, who, the authorities said, had the capacity to distribute 100 kilos, or slightly more than 220 pounds, of heroin a week.

### **Major Suspects Seized**

Furthermore, the officials said, of the 45 persons listed by the Bureau of Narcotics and Dangerous Drugs as major drug distributors in this country, eight were among those arrested.

The investigation that led to the arrest apparently began in late 1971. By early 1972 it centered on the Beech Rose Social Club at 3202 Westchester Avenue in the Bronx.

A police film, taken with a camera hidden inside a box that was propped up on the rear seat of an automobile, showed many of the suspects who were arrested over the weekend entering and leaving the club.

Later, the police said, some of the suspects shifted their operations to a club at 1023 Havenmeyer Avenue in the Bronx.

Federal and police sources said that, as the investigation continued, more suspects were implicated. The police and Federal agents who followed Stephen Dellacava, for instance, were led to Joseph Gernie, who was supposed to be a major dealer in Brooklyn.



# WEATHER

Tonight:  
Clear, 50s

Tomorrow:  
Partly sunny, 70s.

Fair, mild on  
Wednesday.

SUNSET: 6:24  
SUNRISE TOMORROW: 6:15

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## Drug Arrests: 'The Largest Crackdown'

By Robert Bazell and Joseph Berger

More than 60 suspected drug dealers were arrested in weekend raids that one high police source today described as the "largest narcotics crackdown in history."

The source said those seized included "the biggest dealers in the city—people we thought we could never touch."

Another official said the suspects were responsible for selling "the major portion of the heroin and cocaine distributed in the New York area."

The arrests followed the issuance in Manhattan and Newark federal courts of sealed indictments naming 10 persons. The indictments included many named organized crime figures who are alleged to have been involved in the distribution of narcotics.

## 'Largest Drug Crackdown'

Continued From Page 1

Indictment were charged with the federal crime of conspiracy to sell narcotics—punishable by a maximum of 30 years in prison. Several were cited for lesser charges.

A BNDD official predicted the arrests would lead to a significant drop in the availability of narcotics in the city.

To underscore the magnitude of the narcotics operation, U.S. Attorney William

Cresskill, N. J., was named as the head of a New Jersey ring.

Sperling's 66-year-old mother, Cecile, was also arrested on charges of allowing her home to be used to store narcotics, and cash from the sale of drugs.

Also indicted was Vincent Pacelli, who was charged by a federal grand jury last January of plotting the murder of a key government witness at his narcotics trial, model Priscilla Pina. The

now serving a long prison sentence.

The two-year-long investigation included intensive surveillance of a number of East Harlem and South Bronx bars and social clubs and at Mutchie's bar on Market St. on Lower Manhattan's East River waterfront.

Investigators said they took "miles" of audiotape from wiretaps and other electronic eavesdropping devices, and took 106 reels of film of suspects selling

was in full gear, police more than 100 kilos a week were imported into the city and funneled around the metropolitan area and as far away as Detroit. Police estimate the wholesale value of a —2.2 pounds—of heroin \$26,000.

Those arrested included Alfred Catino, 32, 1600 Av. of the Americas, a Thomas Cells, 42, 52 Central Pl., Staten Island brokerage employee; a Defendant, 10 of the 100, and 100.

EXHIBIT "B"

Exhibit B

could never touch."

Another official said the suspects were responsible for selling "the major portion of the heroin and cocaine distributed in the New York area."

The arrests followed the issuance in Manhattan and Newark federal courts of sealed indictments naming 86 persons. The indictments included many reputed organized crime figures who, authorities said, operated in a loosely-knit set of groups that sold heroin and cocaine valued in the tens of millions of dollars.

There were also seven state indictments charging sale and possession of large quantities of heroin and cocaine.

A combined force of 250 agents from the Federal Bureau of Narcotics and Dangerous Drugs and the Police Dept.'s Organized Crime Unit fanned out throughout the city and to points as far west as Detroit to make the arrests.

By this morning, 62 persons had been taken into custody. Although drug seizures were not the object of the sweep, small quantities and several weapons were confiscated, authorities said.

All those named in the

*Continued on Page 4*

*Continued From Page 1*

indictment were charged with the federal crime of conspiracy to sell narcotics—punishable by a maximum of 30 years in prison. Several were cited for lesser charges.

A BNDD official predicted the arrests would lead to a significant drop in the availability of narcotics in the city.

To underscore the magnitude of the narcotics operation, U. S. Attorney Whitney North Seymour told how one undercover agent had negotiated with a number of the suspects for the purchase of 660 to 880 pounds of heroin with a wholesale value of \$12 million and a street value estimated at \$250 million.

Deputy Police Commissioner William McCarthy said the size of the operation made "the French Connection case look like a pebble compared to a boulder."

While the groups were spread around the metropolitan area, police sources said the "command post" was at Pleasant Av. between 116th and 117th St. in East Harlem. The block has often been described as a Mafia base of operations for the Harlem, East Harlem and South Bronx areas.

Seymour said the group arrested today was linked to Louis Cirillo, a reputed large scale drug importer convicted last year of conspiracy to sell narcotics and sentenced to 25 years in prison. At the time of his trial, police dug up Cirillo's backyard and recovered more than a million dollars in cash.

Two men were identified today as kingpins of some of the rings. Herbert Spelling, 35, a clothing salesman in Bellmore, L. I., was held in \$1 million bail. Joseph "Jo Jo" Cappa, 31, of the

Cresskill, N. J., was named as the head of a New Jersey ring.

Sperling's 66-year-old mother, Cecile, was also arrested on charges of allowing her home to be used to store narcotics, and cash from the sale of drugs.

Also indicted was Vincent Pacelli, who was charged by a federal grand jury last January of plotting the murder of a key government witness at his narcotics trial, model Patsy Parks Pino. The narcotics trial ended in Pacelli's conviction and he is

now serving a long prison sentence.

✓ The two-year-long investigation included intensive surveillance of a number of East Harlem and South Bronx bars and social clubs and at Mutchie's bar on Market St. on Lower Manhattan's East River waterfront.

✓ Investigators said they took "miles" of audiotape from wiretaps and other electronic eavesdropping devices, and took 106 reels of film of suspects selling drugs.

✓ When the drug operation

was in full gear, police more than 100 kilos a month were imported into the metropolitan area and as away as Detroit. Police the wholesale value of 200 pounds of heroin \$26,000.

Those arrested include Alfi Catino, 32, 1500 H. Av. the Bronx, a laborer; Thomas Cetta, 43, 82 Central Pl., Staten Island, brokerage employee; Alf DeFranco, 46, of the Bronx, laborer, and Stephen DeCava, 47, of 2267 Second St., a laborer.

Also James Finelli, Mount Vernon; a trader; Norman Gold, 69, 20 Seaman Av.; Christopher Guarino, 38, L. I., writer-producer; Philippe Ivelli, 29, 2781 Grand Concourse, the Bronx, unemployed; Robert Jermolov, Huntington, L. I.; Kaplan, 39, 50 Brighton Brooklyn, owner of the Record Medicine Co., at 2 Chilton Pl.

Also Salvatore Fred Latt, 28, 2177 Muliner Av., Bronx, a florist; Thomas Letini, 29, 323 Pleasant A., unemployed; Joseph Messer, 39, 825 Pennyfield St., Bronx, a laborer; Murad Nasser, 48, no address, a freelance in Suffern, N. Y.; Salvatore Ruggiero, 27, Hallett, L. I., field manager of the Golco Trucking Co.; Anthony V. Sisca, 26, 328 Bay clay Av., the Bronx, unemployed; Herbert Sperling, 31, Bellmore, L. I., a clothing salesman; and Gennaro Telford, 45, 325 Pleasant A., laborer.

# Indict 86 as Big Dope Dealers



DEFENDANT

E-12

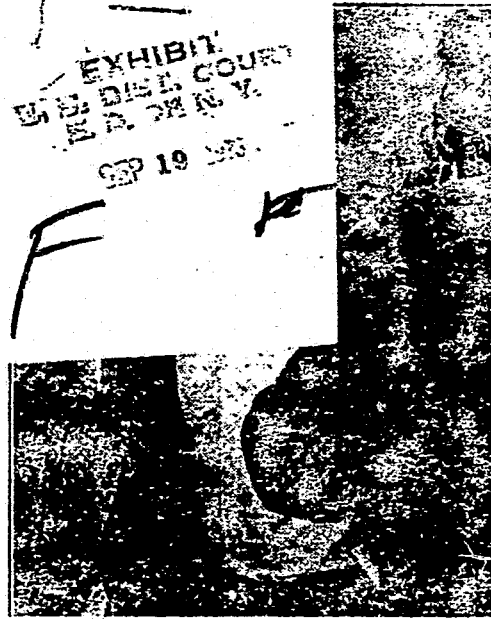
Exhibit E

## Caught in Raiders' Web

Hands cuffed behind back, John Cajra is taken from his opulent home at 15 Northwood Circle, New Rochelle, to Manhattan during weekend roundup of suspected major narcotics dealers. — Stories on page 3; other photo in centerfold

NEWS photo by Bill Stahl Jr.; Copyright 1973 by New York News Inc.





Suspects Jerry Zanfardino, Frank Bassi and Leo Guarino (photos l. to r.) in custody after roundup by police and narcotics agents.

NEWS photos by Gene Kepnock and Jack Smith

# 86 Indicted as Major Dope Dealers

By EDWARD KIRKMAN

An electronic bug planted over a year ago in an East Harlem bar led yesterday to the indictment of 86 persons as major drug dealers, charged with supplying a large portion of the heroin and cocaine in the metropolitan area and as far west as Detroit.

Forty-six of the key drug figures were rounded up over the weekend by teams of narcotics cops and federal agents who combed the five boroughs, neighboring counties and New Jersey. Four men were picked up in Detroit in the roundup, called by Manhattan District Attorney Frank Hogan "the most successful example of cooperation between local and federal agencies."

Information picked up on the "bug" led police, later joined by operatives of the Federal Bureau of Investigation and the New York State Police, to the

and helicopter surveillance. The suspects' activity was recorded in 106 reels of motion picture film.

Detailed Briefing

See page 1 for details of the

tor of the federal bureau, to pick up the suspects.

Security against leaks was so tight that even the 100 men taking part in the raid did not know the story. They had been told that a large shipment of heroin had arrived in Chinatown from the Far East, and were shown a fake cable from the U.S. ambassador in Bangkok tipping off the "shipment."

Among the top figures arrested on conspiracy charges were Herbert Spelling, 40, of

\$250,000 mansion, which, he boasted to detectives, contains a Picasso and an expensive bust of Napoleon, was called by Assistant U.S. Attorney Gerard A. Fetter "one of the major narcotics distributors, not only in this area but in other states as well."

Spelling, who has three new cars, including a Mercedes, and two boats, was held in \$1 million bail, as was Capra. The high bail caused some defendants awaiting arraignment to chuckle and others to snarl. One prisoner shouted: "Why don't you kill us now?" at U.S. Magistrate Harold J. Rapp.

Later, Federal Judge Marvin B. Frankel reduced Capra's bail to \$250,000 and ordered him to report to the U.S. Attorney.



Exhibit F

E-13

area and as far west as Detroit.

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Information picked up on the "bug" led police, later joined by operatives of the Bureau of Narcotics and Dangerous Drugs, to social clubs and bars in the Bronx, Manhattan and Queens, where additional evidence on the suspects, described as loosely linked, was acquired.

In the course of the 15-month probe, investigators employed wiretaps, night photography equipment, auto-tailing devices, ultraviolet powders, marked bills

and helicopter surveillance. The suspects' activity was recorded in 106 reels of motion picture film.

#### A Detailed Briefing

Sealed indictments against the suspects were announced Friday by United States Attorney Whitney North Seymour Jr.'s office, and the arrest teams, after one of the most thorough briefings in law enforcement history, were dispatched by the operation's chief planners, Deputy Police Commissioner William McCarthy and Daniel Casey, regional direc-

tor of the federal bureau, to pick up the suspects.

Security against leaks was so tight that even the 160 men taking part in the raid did not know the story. They had been told that a large shipment of heroin had arrived in Chinatown from the Far East, and were shown a fake cable from the U.S. ambassador in Bangkok tipping off the "shipment."

Among the top figures arrested on conspiracy charges were Herbert Spurling, 35, of 2868 Lee Place, Belmore, L.I., and John (Johnny Hooks) Capra, 33, of 15 Northwood Circle, New Rochelle. Both men, like many of the others collared, reportedly have overseas drug connections and handle as much as a kilo of cocaine or heroin a week.

Spurling, arrested at his

Feffer, "one of the major narcotics distributors, not only in this area but in other states as well."

Spurling, who has three new cars, including a Mercedes, and two boats, was held in \$1 million bail, as was Capra. The high bail caused some defendants awaiting arraignment to chuckle and others to snarl. One prisoner shouted: "Why don't you kill us now?" at U.S. Magistrate Harold J. Raby.

Later, Federal Judge Marvin E. Frankel reduced Capra's bail to \$250,000 and ordered him to report daily to the U.S. Attorney.

Also arrested and held in \$40,000 bail was Spurling's mother, Cecile, 61, of 300 W. 55th St., on charges of concealing drugs in her home for her son.

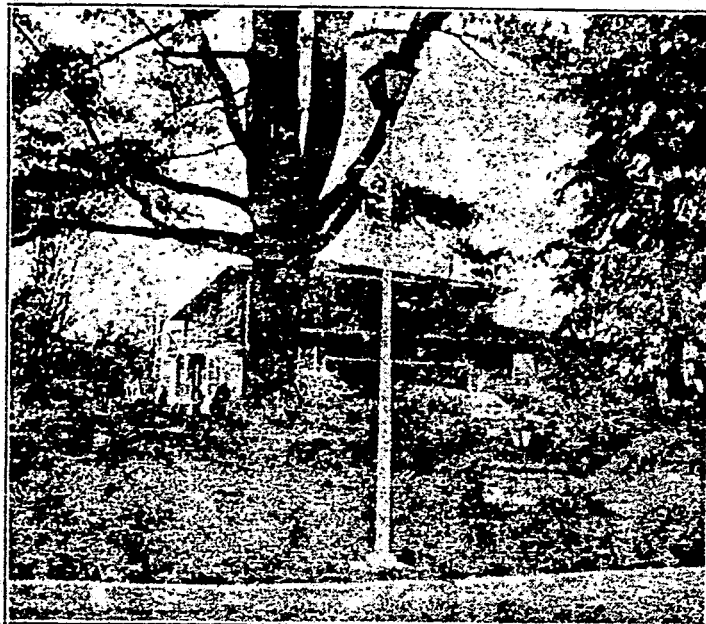
Of the 86 mentioned in the indictment, 46 were rounded up in

(Continued on page 39, col. 3)



NEWS photo by Bill Stahl Jr. Agents escort John Capra to car outside New Rochelle home.

## Not a Bad Pad, the Visiting Cops Observed



Home of suspected drug dealer John Capra in New Rochelle.

By EDWARD KIRKMAN

The petite blonde opened the door and watched as the detectives walked across the white marble-tiled floor, ducked under the low-hung crystal chandelier and stopped in front of a garish six-foot statue with a light bulb screwed into its upraised hand.

As the cold dawn air from the open door filled the foyer, the woman, Connie Capra, retreated up the circular staircase, drawing her white terry-cloth robe around her neck against the chill. "My husband's not here," she said. "He's playing cards with his friends."

Her husband John, who is suspected of dealing in hard drugs, was a top-priority pickup—the police code name for him was "Boss" in the wide-spread federal-police roundup of narcotic dealers over the weekend.

Capra, known as Johnny Hooks to the mob, was actually in the house at 15 Northwood Circle, New Rochelle, and he listened for over an hour from his hideout in the closet of the master bedroom as Connie tried to get rid of the cops.

At first she had protested through the closed door of the two-story colonial house with the white Georgian pillars. Now with the officers, Sgt. Bernard

Gillespie and Detective Frank DeMarco, inside, she tried a new tack. Federal agents William Sokel and Robert Allen guarded the rear door.

"Please leave," she asked as she stood on the gold carpeted steps of the stairway. "My daughters have friends sleeping over. It's so embarrassing. Can't you go outside?" Tears welled up in her brown eyes. "Do you have a search warrant?" The officers did not but, armed with an arrest warrant, they could make inquiry about Capra's whereabouts.

#### White Rug, White Sofa

From their position in the hallway the cops could see into the living room, with its white rugs, white leather sofa and chandelier. Twenty-four paintings and pictures hung on the walls. A grand piano sat in a corner near a large picture window.

As the detectives viewed the room, Connie continued her strategy. "You know we are separated," she said. "He comes home only once or twice a week to sleep. I don't know when he's coming back. I haven't seen him since early in the week."

Connie told the officers to look in the room she called the "basement," which was adorned with rich but unmatched items such as a full suit of

(Continued on page 39, col. 1)

Grand Central, Rockefeller declared:

"I said I would wait and see and that is exactly what I'm going to do, because I think good government is essential for New York City."

Pressed on why a March endorsement has not been forthcoming, Rockefeller added, "What do you want—good government? Right? You've got to elect somebody to get good government."

Carey, who drew Rockefeller's admiration as a key member of the House Ways and Means Committee under Chairman Wilbur Mills (D-Ark.) and by his active support of the governor's efforts to insure federal revenue-sharing, was an early fusion choice of Rockefeller before the governor announced his support of former

nally dropped out of the race last week although he had the Liberal Party nomination and fusion backing from Rockefeller.

#### Carey Is Waiting

The Brooklyn congressman revived his interest in the mayoralty last week by announcing: "I am definitely planning on a possible independent run—hopefully with support from the governor. However, I will wait until the Democratic primary is over."

"I don't see anyone in that race now who has the ability to heal the wounds of New York City and bring the people together. I feel I can do the job better."

Under Board of Election rules, Carey can begin collecting the 10,000 independent nominating signatures for mayor on July 12.

last year, counting on a full slate with running mates for council president and controller. Queried on that possibility, he replied: "If the Democrats choose a one-sided slate, a ticket of just one ethnic group, or one not geographically representative, I feel it will be necessary to come up with a more representative ticket."

Despite Rockefeller's refusal to support him, Sen. March remained calmly hopeful that an endorsement by the governor may yet come through. He declared, "I think he will support me. If he doesn't, the party could be severely damaged if the titular leader refuses to join the grass-roots party movement. This could affect the state election for governor next year."



NEWS photo by Jim Garrett

U.S. Attorney Whitney North Seymour Jr. announces arrests at police headquarters. Seated are Manhattan District Attorney Frank Hogan and Police Commissioner Patrick Murphy.

## Not a Bad Pad, But Where's Dad, Visiting Cops Inquire

(Continued from page 3)

armor, a miniature decorative cannon, a red and black leather bar complete with stools and a black leather sofa with matching chairs.

Also in the room was a glass gun rack with five high-powered rifles. Two large statues of Egyptian figures stood near the bar. A red slot machine sat on the red rug. A wall-to-ceiling circular brick fireplace was in a far corner. Assorted bric-a-brac, including a stuffed fox, surrounded the fireplace. A six-foot-tall painting of a drum-playing clown hung on a nearby wall. An Isaac Hayes "Shaft" album lay on a glass coffee table.

#### A Detail on the Paintings

The opulent life style of the man suspected of being one of the largest narcotic dealers in town also was evident in a den on the first floor. Over a blue velvet-covered sofa hung oil paintings of the couple and their three daughters, ages 11 to 16. A first place trophy won by Capra in a 1971 golf tournament at the Lake Isle Country Club stood high on an expensive end table, which also contained a gold and silver chess set.

The family paintings weren't expensive, said Mrs. Capra. "We had them done last year at the Hotel Americana in Man..." She

made them for only about \$40 each."

Mrs. Capra put on a red blouse and black slacks and joined the detectives in the kitchen. She asked if they really were from the narcotics division. "I can't believe it," she said. "John would never be in something like that, especially since the trouble with his brother Mike." Michael Capra, according to police, is a heroin addict.

#### Subject of IRS Probe

"I thought you were from the Internal Revenue Service," she said. "They have been following me everywhere. They follow me to the meat market, they ask you how much can cold cuts cost. They even go to the drug store and ask what I spend. I have three girls, you know, and sometimes I spend \$27 or \$30 for cosmetics and things."

The Capra family has been the subject of an IRS probe that began shortly after they moved into the house, which is assessed at \$82,000, about 18 months ago. An anonymous letter, asked the federal agency to look into the "Mafia guy" on Northwood Circle, with the three cars and the \$5,000 patio.

Mrs. Capra continued to plead that her husband was not in the house. At 6:30 a.m., an hour after the police arrived, the family attorney, Michael Santangelo, mysteriously arrived. He

blazer and red slacks. He said he was called by the wife of another man picked up in the raid, and figured that police would be at Capra's home.

Mrs. Capra had almost convinced the cops that Capra was not at home, but Sgt. Gillespie heard a footstep on the bedroom floor. The detective threatened that if Capra did not come down, he would have a police car, "complete with dome light, parked in front of the house, so all

the neighbors could see what was going on."

#### Found Him Upstairs

Gillespie went upstairs and in the gold carpeted bedroom, the centerpiece of which was a huge circular bed, found Capra shaving with an electric razor. He meekly surrendered.

The cops placed his hands behind his back and put handcuffs on his wrists. After his rights were read, Capra complained

that one cuff was too tight. Detective DeMarco, while loosening the cuffs asked Capra why he hadn't come right down "instead of hiding behind your wife and kids."

"My kids had two items there," he said. "I didn't wanted to be busted in front of them." He didn't say another word on the way to the Bureau of Narcotics and Dangerous Drugs office at 57th St.

## 86 Indicted as Major Dope Dealers

(Continued from page 3)

the weekend raids and another 16 were already in jail on narcotics and other charges. Three of these were called members of a 40-member East Harlem group called the Wolf Pack.

The three, held in a total of \$1.5 million bail on charges of making sales to undercover cops, were John (Johnny Echoes) Campopiano, 40, of 29 Fieldcrest Road, Yonkers, Oreste (Ernie B-v) Abbamonte, 24, of 45 Inwood Road, Port Washington, L. I., and George Comoutsoz, also known as George Romano, 32, of 1425 Cornell Place, Bronx.

The three men had left for a Miami hideaway when they learned the cops were coming. They

weeks ago and were picked up on charges of firing pistols outside the Beefsteak Restaurant, 710 Second Ave., near 38th St., on March 30.

With them at the time of the Beefsteak incident were eight other Wolf Pack members, including John (Johnny Crow) Della Valle, 30, of 312 E. 104th St., also named in the indictment.

#### Another Is Named

The Wolf Pack operates independently of the Mafia, according to police, and includes some of the biggest cocaine pushers in town. Its membership is being investigated also for numerous stickups and slayings in the last 18 months.

The Wolf Pack was named by the

18-year term on a federal narcotics conviction. Pacelli is awaiting trial for the murder of Patricia Parks, who was found stabbed to death, her body afloat, in a Massapequa, L.I., lot in February 1972.

A witness said Pacelli murdered the girl on the day she was scheduled to go before a federal grand jury to link him to drug-dealing activities.

Capra, one of those held in huge bail yesterday, lives on a palatial New Rochelle estate and bosses a four-man top distributor group, police said. This group was described by a federal prosecutor as "one of the biggest heroin supply systems the city has ever known."

Capra, although a big man to the mob, had been hiding in a closet by 11:30 a.m. and

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# Long Arms of the Law Linked in Big Narcotics Raid

By EDWARD KIRKMAN

A pre-Christmas luncheon in 1971 between two Irishmen, both newly appointed heads of narcotics enforcement agencies, was the beginning of a fast personal friendship and an unprecedented bond between the Police Department and the U.S. Bureau of Narcotics and Dangerous Drugs. Last weekend's huge roundup of alleged top drug

paddlers was a direct result.

One of the two men, William P. McCarthy, a former deputy chief inspector, had been asked by Commissioner Patrick Murphy to end a seven-year retirement and head the Police Department's Narcotics Division and Organized Crime Control Bureau. McCarthy, a no-nonsense enforcer of the law, accepted in November 1971.

## Monthly Meetings

At about the same time the other man, Daniel P. Casey, was transferred from the West Coast by the federal bureau to the sensitive New York office as regional director.

Casey and McCarthy hit it off immediately and began a series of monthly meetings. "The two agencies had problems in the past," recalled Casey yesterday in his 19th floor office on 57th St. "There was a natural suspicion

and distrust between the groups. Bill McCarthy came to me in January of 1972 and said his people were onto something really big—it was the present case, which resulted in the 86 indictments. I offered the services of my offices, which McCarthy accepted, and we worked together all the way."

Casey had originated a common law-enforcement information pool on the West Coast, in which Los Angeles police, the federal bureau and state cops exchanged data on drug pushers. McCarthy accompanied Casey on a trip to California to see the system for himself.

The system was expanded here to include other drug enforcement agencies such as Customs, the federal Office of Drug Abuse Law Enforcement and the office of citywide narcotics prosecutor Frank Rogers—all under the

name Cooperation National Information Council.

"We previously had duplicate

investigations and even cases of several agencies paying the same informant for the same information," said Casey. "That has been eliminated. We have monthly meetings between agency heads and meetings more often between men on the operational levels."

The various groups are seeking to computerize the system so as to make their information available to law enforcement groups across the nation. The council now contains information on 4,000 pushers, including 300 names fed to the pool in the current investigation.

## Bug Disguise Is Letterbox Perfect

Part of the evidence gathered on reputed big-time drug dealer Herbert Sperling and others in last weekend's raids came from their guarded conversations on a Times Square corner that were recorded by a bugging device which cops had hidden in a mailbox.

During the 15-month investigation, officers noted that Sperling, Nick (Mickey Red) Cuccinello, Norman (Sam Gold) Goldstein and about two dozen other figures were frequenting the Gold Rail Bar and a nearby barber shop, both on Seventh Ave. between 55th and 56th Sts.

The alleged dealers, in twos and threes, would usually walk to the northwest corner of Seventh

Ave. and 55th and hold animated conversation near a bus-stop sign.

So last October, Capt. Frank Sullivan of police special investigations unit asked post authorities to place a mailbox on that corner. A court order for the electronic listening device was then obtained. Within hours after the bug was planted, the visitors were recorded by the mailbox.

Cops and federal agents watched from a nearby hotel as they gathered. Films were taken and the conversations monitored. Sullivan recalls on discussion in particular. "I'll bet there's a cop in there," he remembers Sperling saying as he kicked the mailbox. "Yeah," said another. "Hey, little man, come on out." —Edward Kirkman

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DEFENDANT

APRIL 16, 1973

EXHIBIT  
U. S. DIST. COURT  
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Associated Press Photo

Defectives escort one of the suspects seized in the narcotics crackdown past shotgun-toting marshals.

Exhibit G

E-17



Exhibit H



One of the suspects struggles with agents as he is brought into Manhattan command post. NEWS photo by Gene Keppock

SEP 19 1973



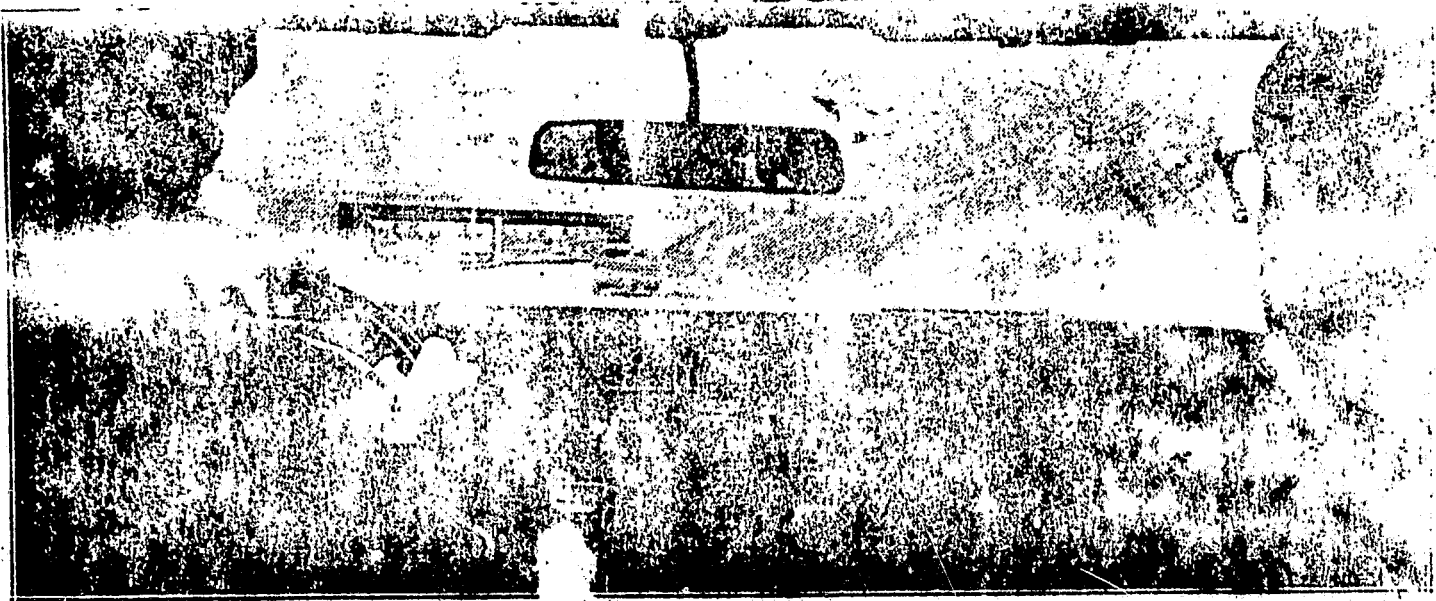
NEWS photo by Bill Stahl

Deputy Commissioner William McCarthy of Organized Crime Bureau briefs lawmen before roundup began.



NEWS photo by Bill Stahl

operation gets under way, some man radio room at W. 57th St.



NEWS photo by Bill White Jr.

With another agents' car follow

car with suspect John Capra in custody heads for city.

## For 86— A Lost Weekend

The operation had all the drama, tension and planning of an Allied invasion during World War II. It even had a safeguard "cover story" with a fake cable from the U.S. ambassador in Bangkok. And all of it spelled a weekend of trouble for 86 alleged major drug dealers. It all started on Friday the 13th, an unlucky day for the suspects, when sealed indictments were announced by U.S. attorney's office. Culminating more than a year of investigation, 160 federal and local agents then started rounding up 46 of the suspects. Sixteen others were already in custody on other charges. Yesterday, all were arraigned in Federal Court.







NEWS photos by Gene Karpach

Stories on page 3; other picture  
page one

Showing varying degrees of emotion, three suspects are taken from 555 W. 57th St. to Federal Court for arraignment. Some cops are armed with shotguns.





**AFFIDAVIT OF PERSONAL SERVICE**

**STATE OF NEW YORK,  
COUNTY OF RICHMOND ss.:**

**EDWARD BAILEY** being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of March, 19 74 at No. FOLEY SQUARE deponent served the within APPENDIX - 7 vol 87 upon U.S. ATTORNEY the APPELLEE herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the atty. for appellee herein.

Sworn to before me,  
this 20 day of March 19 74

  
.....  
  
.....

**WILLIAM BAILEY**

**Notary Public, State of New York**

**No. 43-0132945**

**Qualified in Richmond County**

**Commission Expires March 30, 1973**